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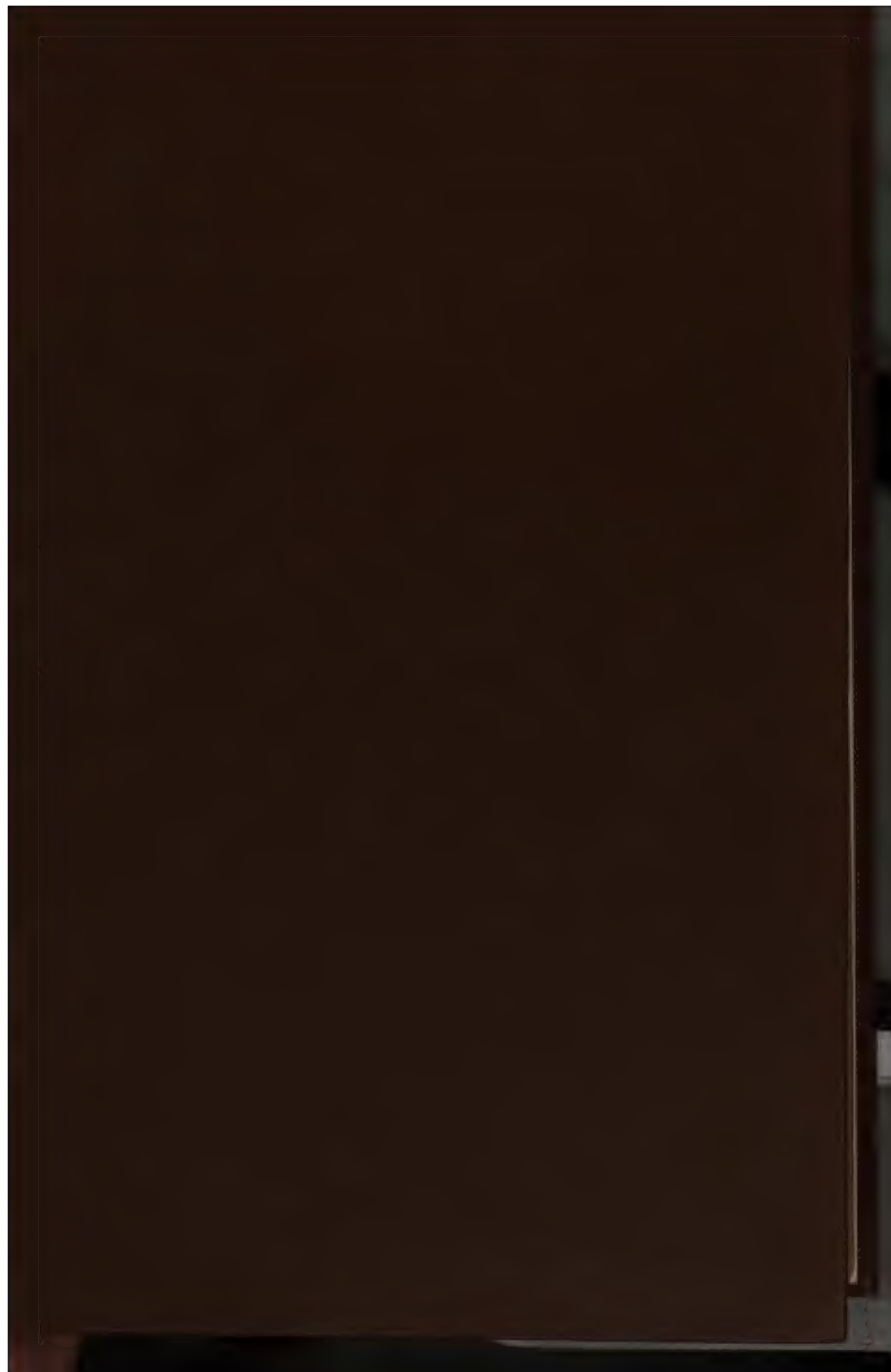
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THE UNIVERSITY OF CHICAGO

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

IRISH COMMON LAW REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,

EXCHEQUER,

EXCHEQUER CHAMBER, AND COURT OF CRIMINAL APPEAL,

DURING THE YEARS 1851, 1852 AND 1853.

Queen's Bench:

By JOHN S. ARMSTRONG, Esq. AND W. H. FALLOON, Esq.

Common Pleas:

By HEWITT POOLE JELLETT, Esq.

Exchequer:

By GRAVES CATHREW, Esq. AND J. P. HAMILTON, Esq.

Exchequer Chamber:

By JOHN S. ARMSTRONG, Esq.

Court of Criminal Appeal:

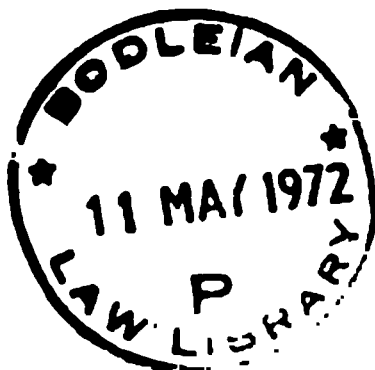
By JOHN S. ARMSTRONG, Esq. AND W. H. FALLOON, Esq.

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Second Justice.—The Hon. PHILIP CECIL CRAMPTON.

Third Justice.—The Right Hon. LOUIS PERRIN.

Fourth Justice.—The Right Hon. RICHARD MOORE.

COURT OF COMMON PLEAS.

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Third Justice.—The Right Hon. NICHOLAS BALL.

Fourth Justice.—The Hon. JOSEPH DEVONSHER JACKSON.

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CHANGES OF JUDGES AND LAW OFFICERS.

THE CHANGES which took place in the Judges and Law Officers, were as follows:—In the Vacation after Hilary Term 1852, The Right Hon. FRANCIS BLACKBURNE was appointed Lord Chancellor, and The Right Hon. THOMAS LEFROY, then Baron of the Court of Exchequer, was appointed his successor in the Court of Queen's Bench, and The Right Hon. RICHARD WILSON GREENE was appointed Baron of the Exchequer. At the same period, JOSEPH NAPIER, Esq., Q. C., was appointed Attorney-General, in place of The Right Hon. JOHN HATCHELL, and JAMES WHITESIDE, Esq., Q. C., was appointed Solicitor-General, in the place of HENRY GEORGE HUGHES, Esq., Q. C. In January 1853, ABRAHAM BREWSTER, Esq., Q. C., was appointed Attorney-General, in the place of The Right Hon. JOSEPH NAPIER, and WILLIAM KEOGH, Esq., Q. C., was appointed Solicitor-General, in the place of JAMES WHITESIDE, Esq., Q. C.

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COMMON LAW REPORTS,

OF CASES ARGUED AND DETERMINED IN

THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS, EXCHEQUER,

Exchequer Chamber

AND

COURT OF CRIMINAL APPEAL.

RYAN *v.* THE GUARDIANS OF THE POOR OF
THE KILDYSART UNION.

(*Exchequer.*)

M. T. 1851.
Nov. 7.

ASSUMPSIT, for a-half year's salary for work and labour performed by the plaintiff as medical officer to the Union, appointed under the 12 *Vic.* c. 131, one of the Temporary Fever Acts. At the trial before Torrens, J., in the Sittings during Trinity Term, a verdict was taken for the plaintiff by consent, subject to be entered for the defendants, if the Court should be of opinion that the appointment of the plaintiff by the defendants was invalid from either of two reasons ; first, because the appointment was not under seal, or secondly, because the Commissioners of Health had retracted their approval of it.

The appointment of officers by Boards of Poor-law Guardians and other acts specified in the General Orders of the Poor-law Commissioners, need not be under seal, if made and authenticated as prescribed by those General Orders ; nor,

It appeared that the defendants in May 1850, upon the requisition

if so made and authenticated, need the requisitions of the 28th section of the "Poor-law Act" (1 & 2 *Vic.* c. 26) be complied with, where more than three guardians are present and voting.

The Board of Health, under 12 *Vic.* c. 131, s. 4, have no power to retract their approval of an appointment under that Act, where it has not been obtained by fraud or under a mistake.

M. T. 1851. of the Commissioners of Health under the 12 Vic. c. 131, appointed
Exchequer. the plaintiff temporary medical officer to the Union under that Act;
 RYAN and that the appointment was approved by the Commissioners as
 v. required by the Act, by letter of the 28th of May. On the
 KILDYSART 31st of May the Commissioners by letter retracted their approval
 UNION. without assigning any reason, notwithstanding which the defendants
 continued to employ the plaintiff and were anxious to pay him, but
 the Poor-law Commissioners refused their assent to this, and com-
 pelled them to defend this action. The appointment of the plaintiff
 was not under seal, but was made by a majority of the board of
 guardians, and was evidenced by an entry of the proceedings in the
 books of the board, signed by the chairman and clerk.

J. D. Fitzgerald, with *Brereton*, now showed cause against a conditional order, obtained by *Fitzgibbon* on a former day, to enter the verdict for the defendants. The Commissioners of Health, having approved of the plaintiff's appointment, could not invalidate that appointment by a simple withdrawal of their approval. The 4th section of 12 Vic. c. 131, gives no power to the Commissioners to determine the appointment, but merely to "certify to the Lord Lieutenant that such appointment was no longer expedient," which they had not done.

As to the second question, such an appointment need not be under seal; but the manner in which it shall be made is regulated by the 12th article of the general orders of the Poor-law Commissioners, and the manner in which it shall be evidenced by the 15th article. The 1 & 2 Vic. c. 56, s. 3, empowers the Commissioners to issue "general orders for the government of workhouses, the making of contracts, the appointment of officers," &c.; and they have by the 12th, 15th and 28th articles prescribed both the mode of making such appointments, and the evidence of them when made.* The appointment in this case, and the evidence of it, are in conformity with

* Article 12.—"Every question at any meeting consisting of more than three guardians shall be determined by a majority of the votes of the guardians present thereat, and voting on the question," &c.

Article 15.—"The minutes of the last ordinary meeting, and of any other

these articles. The only duty of the guardians is to elect, and the entry of the minutes of their proceedings, signed by the chairman and clerk, is sufficient evidence of that election. The 28th section of the 1 & 2 Vic. c. 56,* shows that it was the intention of the Legislature, in the case of boards of guardians, who have to deal with a great variety of matters, to supersede the general law relating to the contracts of corporate bodies; and as a further evidence of this intention, the Commissioners are empowered to make rules regulating the modes of appointment, and of contracts by such boards. The 28th section, however, is not imperative in its terms, for the first branch of it only makes the acts of the majority as valid as if done by the whole board, but does not prescribe any mode for their authentication; and the second part only makes the signature by three guardians *prima facie* evidence of the act done.—[LEFROY, B. Perhaps the object of that section was to do away with the inconvenient necessity of producing the books of the board on every occasion, and has reference to contracts to be produced and proved in Courts of Justice.]—We rely on the 12th and 28th articles; and if we have an authentic record of what took place, we carry our case.

M. T. 1851.

Exchequer.

RYAN

v.

KILDYSART

UNION.

Ormsby, with *G. Fitzgibbon*, in support of the conditional order.

The appointment was invalid, because not under the seal of the

meeting which may have been held since such ordinary meeting, shall be read to the guardians and signed by the chairman presiding at the meeting at which such minutes are read; and an entry of the same having been so read shall be made in the minutes of the day when read."

Article 28.—"Every officer and assistant to be appointed under this order shall be appointed by a majority of the guardians present at any meeting of the board in the manner directed in article 12," &c.

* Section 28.—"And be it enacted that the board of guardians in every union shall meet at such times, &c.; and all lawful acts, contracts and matters done, entered into and transacted at such meetings by a majority of the guardians present and voting, and verified by the signature of three of such guardians, and countersigned by their clerk, shall be as valid and effectual as if all the guardians had been present and concurred; and the signatures of three guardians, members of any board, affixed to any resolution, contract or order, purporting to be entered into or made by such board of guardians, shall be *prima facie* evidence that such resolution, contract and order was duly entered into or made by such board."

M. T. 1851.
Exchequer.
 RYAN
 v.
 KILDYSART
 UNION.

board, a corporate body : *Payne v. Guardians of the Strand Union (a)* ; *Lamprell v. Guardians of the Billericay Union (b)*.

The only exceptions to the general rule as to Corporations are contracts for matters of daily necessity, or for things which are the immediate object of the constitution of the Corporation. If the 28th section be relied on as providing a different mode of authentication than the seal of the board, it has not been complied with, for the minutes of the plaintiff's election were not signed by three guardians, as required by that section. Besides, the retractation of their approval by the Board of Health was received by the defendants on the 31st of May, and the chairman's signature had not then been affixed to the minutes of the transactions of the previous meeting of the board.—[LEFROY, B.—The authentication is not that which makes the act valid ; it is merely an evidence that the act has been done.]—We contend that the appointment, if not under seal, must be evidenced by the signature of three guardians, under the 28th section.

Brereton, in reply.

The entry of the minutes of the plaintiff's election was in accordance with the 15th article prescribed by the Poor-law Commissioners, and *Rex v. Chalke (c)* is an authority to show that where an appointment is made by election by the majority of votes of a corporate body, it need not be under seal. The 28th section of the Poor-law Act is not imperative. It is the 25th article of the Commissioners which regulates the making of appointments such as the present, to which the 15th article also applies ; we insist that under them there has been a valid appointment, properly evidenced, and that the retractation of the Commissioners is of no avail.

PIGOT, C. B.

With respect to the retractation of the Board of Health vitiating the appointment of the plaintiff, that objection cannot prevail.

(a) 8 Q. B. 396.

(b) 3 Exch. Rep. 203.

(c) 1 Lord Raym. 225.

The Act of Parliament, authorising these appointments, makes it imperative on boards of guardians to appoint, and to return their appointment to the Board of Health, who have the power to approve of the appointment. This they did in the present case. But the Act gives them no authority to dismiss an officer so appointed. They have merely the power to certify to the Lord Lieutenant the inexpediency of the continuance of such appointment. Whether the certificate of inexpediency is to be applied only to the case of the medical officer becoming unnecessary, or whether it extends to the case of his misconducting himself, it is not necessary here to determine. But if we were to hold that their retraction amounted to an order requiring the guardians to dismiss the plaintiff, we should be sanctioning, in the Board of Health, a power which the Act does not confer. The retraction, indeed, followed closely upon the approval; and if it appeared that the approval was by mistake, or resulted from deceit or fraud practised on the board, the approval and its withdrawal, taken together, might perhaps be taken as, in effect, a disapproval, pronounced in due time. But the evidence proves, that the power of approval was deliberately exercised, and that the Commissioners retracted their approval without any pretence of mistake. The main question then is, whether the appointment made by the board of guardians is a valid one? And that involves the simple inquiry, whether the appointment ought to have been authenticated by seal, or at all events by the signatures of three guardians under the 28th section? That section undoubtedly prescribes that "when any act or contract shall be done or entered into "by a majority of the board of guardians, the signatures of three "such guardians and that of the clerk shall be *prima facie* evidence "of such act or contract." But in that section there is no negative provision; and the question remains, whether, independently of it, the necessity for the seal of the board is dispensed with? On that point an authority has been cited from *Lord Raymond*, which, in the absence of any other, appears to me to apply, the case of *Rex v. Chalke* (a). The Court there held that there were two modes in which a burgess might be appointed, either by patent under the

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common seal, or by election; and that in the latter case an entry of it in the books was a sufficient authentication. By the 3rd section of the Act the Poor-law Commissioners are empowered to make general orders for (besides other matters) the appointment of officers. By the 28th article of the general order of the 5th of June 1844, made by the Commissioners, it is provided, that every officer to be appointed under that order "shall be appointed by "a majority of the guardians present at any meeting of the board, "in the manner directed in article 12." Article 12 directs, that "every question at any meeting consisting of more than three "guardians shall be determined by a majority of the votes of the "guardians present thereat, and voting on the question." In article 25, the medical officer is stated as one of the officers dealt with by the order. By the 28th section of the Act (1 & 2 Vic. c. 56), "All lawful ACTS, contracts, and *matters*, done, entered "into, and transacted, at such meetings by a majority of the guar- "dians present, and voting, and verified by the signature of three "of such guardians, shall be as valid and effectual as if all the "guardians had been present and concurred; and the signature "of three guardians, members of any board, affixed to any *reso- lution*, contract, or *order*, purporting to be entered into or made "by such board, shall be *prima facie* evidence that such resolution, "contract, or order, was duly entered into or made by such board." By the 15th article of the general order of the 5th of June 1844 (which prescribes the order in which the business shall be conducted at the ordinary meetings of the guardians), there is the following direction:—"The minutes of the last ordinary meeting, and of any "other meeting which may have been held since such ordinary "meeting, shall be read to the guardians, and signed by the chair- "man presiding at the meeting at which such minutes are read; "and an entry of the same having been read shall be made in the "minutes of the day when read." These are the enactments of the statute, and the orders of the Commissioners made under its provisions, and therefore to be treated as incorporated in it. By these we are to determine whether there is sufficient evidence of that "act" of election, which the 28th section of the statute, and

the 12th, 25th, and 28th articles of the general order, empowered the guardians to execute. By that section the signature of three of the guardians is made *prima facie* evidence of the "resolution," or "order" of the board. But it is not made the only evidence of such resolution or order. The 15th article of the general order prescribes, under the authority of the statute, another mode of authenticating the acts of the board—namely, by the signature of the chairman presiding at the meeting at which the minutes (comprising, of course, the acts of the board) are read; and by the entry of the same having been so read, being made in the minutes of the day when read. This is quite conformable, in effect, to what was considered sufficient proof of election in the case in 1 *Lord Raym.* "Per Holt, C. J.:—If a burgess be constituted by patent under the common seal, he ought to be discharged in like manner; but if by election, then it is only entered on the book; and an order is sufficient to discharge him: so that they may disfranchise him without any instrument under their common seal." In the present case the appointment was by election. Of that election there was an entry (as in the case of *Rex v. Chalke*); and that entry was authenticated in the manner prescribed by the general order of the Poor-law Commissioners. Applying then the provisions of the statute and the authority of the case of *Rex v. Chalke* to the general order (which prescribed both the mode of election and the manner of recording it), and to the entry by which, in the present case, the plaintiff's election was set forth in the minutes of the board of guardians, I am of opinion that the election was valid, although there was not an appointment under the corporate seal, and that there was sufficient evidence to prove it, in the minutes of the proceedings, entered and authenticated, in conformity with the general order.

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LEFROY, B.

I confess I was forcibly struck by the observations of Mr. *Fitzgerald*, that it was not the intention of the Legislature, although for the convenience of suing and being sued they created boards of guardians corporate bodies, to leave them to the rigid rules which

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Act makes provision for the mode of their proceeding in such cases, and also empowers the Commissioners to prescribe rules regulating such : this would therefore show an intention on the part of the Legislature to leave them to the rules so prescribed, and not to that contingent rule which requires that the proceedings of a corporation should be attested by their seal. Well then, we have a general rule prescribed by the Commissioners, authorising certain acts to be done by a majority of the guardians, whose acts are not required by the rule to be authenticated by their seal, but by the entry of a minute of the proceedings in a book kept for that purpose. We cannot therefore imply that it was the intention of the Legislature to require an act of this kind to be under seal alone, but that it might be authenticated according to such rule as should be made by the Commissioners. We find here an election by a majority of the guardians. The Commissioners require by their rule an act of the kind to be done by a majority ; we should therefore require strong negative words in the 28th section of the Poor-law Act, to invalidate the act of a majority of the guardians, *exceeding three*, authenticated as required by the general rule. The intention of that section, in requiring the signatures of three guardians, was to provide against acts being done by less than three, so as to secure a majority. It was not the intention by it to oust the authority of the majority, but to secure it.

PENNEFATHER, B.

I concur in the observations which have fallen from the Court. The 28th section strongly shows that it was not supposed by the Legislature that all the acts of these bodies were to be under seal.

Cause shown allowed.

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ORR and another, Assignees of PURDY,

v.

MURDOCK.

Nov. 8, 10, 12.

TROVER, for four puncheons of whiskey.

At the trial before the CHIEF BARON in the Sittings after Hilary Term 1851, it appeared that the bankrupt had, on the 8th of April 1850, purchased ten puncheons of whiskey from Graham, Menzies and Co., of Edinburgh, to be shipped to Newry, and to be paid for by a bill at ninety days, which was not paid. On the 20th of April Purdy received the usual delivery order, addressed to the collector of excise, and running as follows:—

“8th April, 1850.

“SIR—Receive the duty and deliver to the order of Mr. Joseph Purdy, Newry, the under-noted ten casks of British plain spirits, warehoused at Newry, on the 20th of April 1850, by Graham, Menzies and Co., distillers, at Sunbury, Edinburgh.

“GRAHAM, MENZIES AND Co.

“To the collector of excise at Newry.”

This order was lodged with the storekeeper of the excise, and under its authority Purdy took out of the store, between the 20th of April and the 27th of June following, eight of the ten puncheons on warrants signed by the collector. The whiskey remained in the books of the excise, entered in the name of the distiller, and not transferred to the name of the vendee. The duty upon that which

A, a Scotch distiller, had consigned ten puncheons of whiskey to B, an Irish spirit dealer residing in Newry. With the consignment A sent to B an invoice of the whiskey, and a *delivery order* directed to the collector of excise at Newry. The latter document ran thus:—

“SIR—Receive the duty, and deliver to the order of B the undermentioned ten casks of British plain spirits, warehoused at Newry on the 20th of April 1850, by A and Co. &c. (Signed) A and Co.” B lodged the delivery order

with the storekeeper of the excise, and removed six of the ten casks, having paid the duty on them, but no transfer of the whiskey was made to the name of B in the excise books. B afterwards became bankrupt, and A transferred the four puncheons which remained in the excise stores, to C, who paid the duty on them and removed them. Trover having been brought by the assignees of the bankrupt for these four casks—*Held*, that the possession was transferred from the vendor to the vendee by the lodgment of the delivery order, without any transfer in the books of the excise, and that the right of stoppage *in transitu* by the unpaid vendor was therefore gone.

Held also, that the payment of the duty by the vendee was not a condition precedent under the delivery order.

M. T. 1851. was removed was paid by Purdy at the time of removal; that on
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 the remainder was not paid. The plaintiffs also proved the invoice
 of the whiskey sent to Purdy, with the following note annexed :—

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“Mr. J. PURDY.—SIR—Agreeable to your order we now prefix
 “invoice of ten puncheons shipped *per* Mary Anne on *your*
 “*account and risk*, amount *including insurance* £—., for which
 “sum we have drawn on you at ninety days. Please honour the
 “same. Inclosed is the delivery order. (For Graham, Menzies
 “and Co.) “H. CATTARACK.”

On the 22nd of June Purdy apprised Graham, Menzies and Co., by letter (as also Stuart and Co., by whom three puncheons of whiskey were shipped to him under exactly the same circumstances), that he should be obliged to call a meeting of his creditors. Upon this both firms wrote to the collector at Newry, countermanding any further delivery to Purdy; none of Stuart's whiskey had been delivered to him. The commission of bankruptcy was sued out on the 13th of August, and on the 14th and 15th the defendant Murdock received from the distillers delivery orders for four puncheons which remained in the excise store, under which he obtained possession of them, having paid the duty, the distillers also indemnifying the excise officers. For these the action was brought. It appeared in evidence that according to the usage of trade, the property in the goods passed by transfer of the delivery order; and that the storekeepers recognised the holder of such delivery order as the owner, to whom alone they would give possession. The jury found a verdict for the plaintiffs, under the direction of the learned CHIEF BARON, who held that under the circumstances above mentioned, the right of stoppage *in transitu* had ceased to exist, and that the right to possession of the whiskey had vested in Purdy, under the delivery orders. To this ruling Counsel for the defendant excepted. The exceptions resolved themselves into the questions whether the property in and right of possession of the whiskey vested in Purdy by the delivery orders, and whether the right of stoppage *in transitu* had been determined by lodging the delivery orders with the storekeepers?

Hayes (with him *R. W. Greene*), in support of the exceptions. M. T. 1851.

Trover does not lie in this case. It can only be maintained where an immediate right of possession exists; and here the bill not having been paid, the vendor's lien revived: *Stephenson v. Blakelock* (a); *Davis v. Lowndes* (b); *Winks v. Hassell* (c). There had been no offer here to pay the duty according to the contract, which was the ground of the decision in *Winks v. Hassell*. Here also the payment of duty was a condition precedent to the vendee's obtaining the right of possession, as was manifest from the wording of the delivery order. Until that was done the vendor retained his lien. Where any thing remained to be done to complete the contract, the vendor's right of stoppage *in transitu* still subsisted: *Bloxam v. Saunders* (d); *Northy v. Field* (e). The delivery order did not like a bill of lading give possession, but merely an authority: *Townley v. Crump* (f); *M'Ewen v. Smith* (g). In the latter case the question was treated as that of a vendor's lien, and not as one of stoppage *in transitu*, and a distinction was made between the effect of a bill of lading and of a delivery order, the authority given by which latter might be revoked: *Melrose v. Hasty* (h); *Feise v. Wray* (i). The taking of the bill did not affect the rights of the parties: *Edwards v. Brewer* (k). Partial delivery does not take away the right to stop *in transitu*: *Tanner v. Scovell* (l). The case of *Haig v. Wallace* (m) might be cited on the other side; but there, there was a transfer of the goods in the books of the excise to the name of the vendee, not so here. *Knowles v. Horsefall* (n).

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Charles Bagot (with whom was *J. D. Fitzgerald*), contra.

The question here is mainly on the right of stoppage *in transitu*, defined as "an equitable lien of the vendor of goods not paid for, by which he may arrest them while *in transitu*." But when goods are

(a) 1 M. & S. 535.

(c) 9 B. & C. 372.

(e) 2 Esp. 613.

(g) 2 H. of Lords Cases, 389.

(i) 3 East, 93.

(l) 14 M. & W. 28.

(b) 3 C. B. 829.

(d) 4 B. & C. 941.

(f) 4 Ad. & El. 58.

(h) 23 Scotch Jurist, 328.

(k) 2 M. & W. 375.

(m) 2 Esp. 613.

(n) 3 H. & B. 671.

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once in the custody, disposition or control of the vendee the right of stoppage *in transitu* is gone. There are cases in which, while the goods were still actually in the vendor's possession they were held to have vested in the vendee by the vendor's receipt of warehouse rent, which made him agent for vendee: *Hurry v. Mangle* (a). So when deposited in a warehouse for which the vendee paid rent, though not actually delivered to vendee: *Wright v. Lawes* (b). So delivery of part or of samples divested the right of stoppage *in transitu*: *Jones v. Jones* (c); *Foster v. Frampton* (d). These were so many instances of acts of ownership by vendee, the exercise of which was held to have put an end to the right of stoppage *in transitu*: *Ellis v. Hunt* (e). The delivery order therefore to Purdy signed by the vendors, on being presented to the collector of excise by him, was such an act or claim of ownership as to put an end to the right of stoppage *in transitu*. It was such a notice to the storekeeper as made him thenceforth agent for the vendee, as he had previously been for the vendors: *Harman v. Anderson* (f). The whiskey was also shipped at the risk of Purdy, and he was charged with insurance. The payment of duty was not a condition in the delivery order, but a direction; and the moment the delivery order was handed to the officer of excise the property vested in the vendee without any transfer in the books: *Lucas v. Dorrien* (g); *Searle v. Keeves* (h). In *Winks v. Hassell* (i) the payment of the duty by the vendee was the subject of a special agreement. But the ordinary liability to the Crown does not enter into the question of the contract, unless specially provided. In *Haig v. Wallace* the delivery order was the same as here, and *Harman v. Anderson* showed that the transfer in the books is immaterial. There was therefore no lien here, the possession not remaining with the vendor, nor right of stoppage *in transitu*, that having ceased when the goods came into the possession of the vendee. In *Northey v. Field* there

(a) 5 B. & Al. 134.

(c) 4 Esp. 82.

(e) 6 B. & C. 107.

(g) 2 Camp. 243.

(b) 1 Camp. 452.

(d) 8 M. & W. 431.

(f) 3 T. R. 464.

(h) 2 Esp. 598.

(i) 7 Taunt. 278.

was no actual or constructive possession in the vendee. *Winks v. M. T. 1851.*
Hassell and Townly v. Crump were cases of lien, and in *Tanner* *Exchequer.*
v. Scovell there was no relation between the wharfinger and the ORB
bankrupt vendee. The lodging the delivery order was sufficient to v.
change the possession: *Cooke v. Lawder (a)*; *Keyser v. Suse (b)*; MURDOCK.
Barton v. Boddington (c); *Tucker v. Ruston (d)*. The Excise
Acts do not affect the question: their purview was not to prevent
any complete sale of goods until the duty was paid; the Crown has
the possession of the goods as security for the duty, the goods being
handed over subject to the payment of the duty, and the vendee
substituted for the vendor by the sale; and this is the view taken by
the Court of Queen's Bench in this country in *Haig v. Wallace*.

R. W. Greene, in reply.

To enable the assignee of a bankrupt to maintain trover against
the unpaid vendor of goods, the bankrupt must have had at the time
of the bankruptcy not only the right of property in the goods, but
the right of possession; and though he acquire the right of property
by the purchase, he can acquire the right of possession only by pay-
ment or tender of the price: *Bloxam v. Saunders (e)*. The bill
being unpaid, and the vendee a bankrupt, the vendor had a right
to stop the goods *in transitu*: *Edwards v. Brewer (f)*; and this
right of the unpaid vendor was not divested by the delivery order
until it was finally acted on: *Townley v. Crump (g)*. It is a mere
authority countermandable. The vendor's right grows out of his
original ownership, and payment or tender of the price is necessary
to vest the right of possession in the vendee. The authorities on
the other side do not apply. In *Hurry v. Mangles* there was an
actual change of possession, the vendor having received rent from
the vendee as his warehouseman. *Harman v. Anderson* might be
impugned; but in this case there is no delivery order within the
authority of that. The order there was unconditional. In *Lucas*

(a) 9 Ir. Law Rec. 21, judgment of Bushe, C. J.

(b) Gow. 58.

(c) 1 C. & P. 207.

(d) 2 C. & P. 86.

(e) 4 B. & C. 948.

(f) 2 M. & W. 378.

(g) 4 Ad. & Ell.

M. T. 1851. *v. Dorrien* not only was the *transitus* at an end, but the dock warrant issued by the wharfingers attested that they held the property for the transferee. In the present case an unpaid vendor sells to a man who becomes bankrupt, and gives the vendee a delivery order, addressed to the collector of excise. The order is conditional, "receive the duty, &c., and deliver," &c., and is not addressed to the person in whose custody the goods are, but to his superior officer. The storekeeper has no authority to act on this order; the warrant to him is made out by his superior officer, and directs him to "deliver, the duty having been paid." The delivery order can by indorsement confer no right; it is a mere authority countermandable. In *Ellis v. Hunt* the goods were marked by the vendee. In *White v. White* the jury had found as a fact that possession was taken. The other cases cited were cases of actual or constructive possession. It had been proved that the practice was not to transfer the property in the books of the excise until the duty was paid; and the right of the unpaid vendor was therefore not divested until the order was finally acted on: *Edwards v. Brewer*; *Townley v. Crump*; *M'Ewen v. Smith*.

PIGOT, C. B., having stated the facts of the case, said:—

Was then the vendor entitled to prevent the actual delivery of the residue of the whiskey, on the ground that it was in his own custody? or, that being in the custody of another, he had that right of stoppage *in transitu* which exists in an unpaid vendor before the actual or constructive possession of the vendee? Was the property in the vendor's actual possession, not having passed; or being in the custody of a third party, could the vendor stop it *in transitu*? I am disposed to treat the case as one of stoppage *in transitu*, and not as that of goods remaining in the hands of the vendor. I may here observe that upon the evidence the contract appears to have been for the sale of a specific chattel, the payment of duty having formed no part of it. As to the possession, the difficulty is in ascertaining the effect of the delivery order. There is no doubt that, where any thing remains to be done either by the vendee to complete the contract, or by the vendor to transfer the possession, the right

of stoppage *in transitu* exists in the vendor. Upon every sale of a specific chattel the right of property passes, and the right of possession is vested in the vendee, but that right reverts in the vendor on the dishonour of securities given and accepted in payment; but whether from the right of the vendor thereupon either to rescind the contract, or to assume a lien upon the goods as a security for the price, it is unnecessary to determine. It has been argued that by the delivery order the condition that the purchaser should pay the duty was annexed, and therefore that the sale was not absolute until that was done, as the vendor remained liable for it to the Crown. But the property was altered by the sale and passed to the vendee, subject to the Crown's right to duty; bills were given for the price exclusive of duty, for which the possession of the whiskey was a sufficient security to the Crown. The words of the order do not make a condition precedent. Such language, if addressed to an agent of the vendor, would have that effect, but not to a servant of the Crown. It amounts merely to an intimation from the vendor apprising the officer that he has put the vendee into his own place, and that the goods are transferred to him, with their liability to the Crown. In *Haig v. Wallace* the officer acted on the delivery order by transferring the goods in the books of the excise to the name of the vendee; but that act of the officer could not alter the effect of the acts of the parties. Every part of the judgment in that case applies to the present. If the contract were conditional in the present case, it would fall within the authority of *Winks v. Hassell*, where, by express agreement, the vendee was bound to pay the duty. The judgment there was founded, not on the mere fact that the duties were to be paid, but on the agreement between the parties that it should be paid by the vendee. I expressly found my opinion on *Haig v. Wallace*, and on the similar decision in *Croker v. Lawder*. It was there held that there was nothing in such a delivery order to make the contract conditional. I found my judgment on these authorities, and express my strong impression that, whatever views may be taken of cases long acquiesced in, and which have long governed the course of trade, nothing but a clear conviction that their decision is against some principle of law should induce

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 MURDOCK. the Court to unsettle the rules established by them, and to which the transactions of mercantile men have conformed themselves. This and other cases show that articles subject to duty must be the subject of dealings between parties when in the custody of the Crown; and great difficulty might be created, if it should be considered necessary in every case that the actual possession should be taken by the vendee; or if there were any thing in the rule of law to prevent such dealings, having regard to the price of the article only, exclusive of the duty. The Crown is not thus prejudiced, for it has the possession of the goods as a security for the duty; there is nothing inconsistent in the parties so dealing, and we think they have so dealt here.

The question then remains, whether any thing else remained to be done by the parties, and especially by the vendor, to complete the transfer of possession? The rule on this subject is very briefly laid down in *Abbott on Shipping*, a text-book of the highest authority, at p. 526:—"Goods are often sold upon credit while they remain in the custody of the warehouseman," &c.—[His Lordship read the passage.]—Now without referring to cases in which the law is laid down in almost these terms, this proposition is clear, that when goods are in the hands of a third party, and when every thing is done which is to be done to render the contract complete, the right of stoppage *in transitu* is gone, if the possession has been changed; therefore the question is, whether there has been an actual change of possession, or any thing tantamount to it? In a vast number of cases, acts of dealing with the property, as part delivery, taking samples, &c., have been held tantamount to a delivery and change of possession. Sometimes they are so, sometimes not. The criterion is, whether, with regard to the subject-matter, the nature of the contract and the duties of the parties, they are intended so to be? Here nothing remained to be done between the buyer and seller; no weighing, no measuring, nor any other act as between them preliminary to delivery. The simple question then is whether, nothing remaining to be done by the seller, or by the buyer as between him and the seller, that was done by the seller which is tantamount to giving possession? On this question *Haig v. Wallace* is no au-

thority. There was there an actual transfer to the name of the buyer. But there is a decision on this point, *Harman v. Anderson*. In that case, on a motion to reduce damages, Lord Ellenborough in his judgment says:—"After the delivery note was lodged with the wharfingers, they were bound to hold the goods on account of the purchaser; the delivery note was sufficient without any actual transfer being made in their books." There is but one element distinguishing that case from the present, viz., the liability of the goods here to duty; but that is merely the charge of a third party, and which, as to any privity between the vendor and vendee, cannot affect their rights; so that *Haig v. Wallace* rules the first part of this case, and *Harman v. Anderson* the second. The warehouseman at Newry, after the lodgment of the delivery order, became the agent of the vendee, as before he had been that of the vendor. *Harman v. Anderson* is a distinct authority on that part of the case, and has been recognised in *Lucas v. Dorrien*, and in *Knowles v. Horsefall*. In the latter case the right of stoppage *in transitu* was held to exist, the delivery order there not having been communicated to the warehouseman; but I cite the case to show Lord Tenterden's view of the subject, recognising the rule in *Harman v. Anderson*. I refer also to the case of *Tucker v. Russell*, at Nisi Prius, as evidencing the assent of the Bench and the Profession to this proposition. These authorities appear to be perfectly decisive, and not shaken by after decisions. Two cases, however, were referred to for this purpose—*Townley v. Crump*, and *M'Ewen v. Smith*. But in the first the Court distinguished cases between the vendor and vendee from cases between third parties. The possession in that case was in the vendor, and the delivery order to the vendee was part of the original contract; and if the goods were not paid for, the contract was avoided, and a lien existed.

In *M'Ewen v. Smith*—[His Lordship stated the facts of that case]—the Lord Chancellor says:—"The next argument is that the possession of the goods was changed by what took place with Alexander (the agent of vendor) on the 25th of September. But it is clear to my mind that Alexander was not himself in actual possession of the goods, and that what he did at that time could

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M. T. 1851. "not change the possession." This was a case in which the goods were stored in the name of the agent of the vendors, no step taken by the vendees with regard to taking possession of them, and was treated by the House of Lords as a case of lien, and not of stoppage *in transitu*. I cannot distinguish the present case, in the first part of it, from *Haig v. Wallace*, and in the second from *Harman v. Anderson*.

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One other topic was mentioned, as to the effect of that portion of the Act 11 & 12 Vic. c. 122, which prescribes the form of transfer. That argument was not pressed, and I think it does not affect the case.

PENNEFATHER, B.

This is a question of much importance. My LORD CHIEF BARON however has gone through the cases with such minuteness, and has so exactly stated their bearing, that it is not necessary for me to follow in the same line. I own I felt considerable difficulty on one part of the case, but though that difficulty is not entirely removed, I hold myself bound to yield the opinion which I may say I had on the subject to the authorities adduced for the plaintiff. It is very desirable that the rule on this subject should be distinctly laid down. The right of stoppage *in transitu* is a right given to the unpaid vendor of goods to arrest the goods for which he is so unpaid, provided the *transitus* continues; and that depends upon the question, whether there has been an actual or constructive delivery of them to the vendee? The question generally arises in the case of constructive delivery. This is the general rule; when goods are sold which are either in warehouse at the time of sale, or are transferred to a warehouse after by the vendor, and when there is no condition in the order of delivery, when nothing remains to be done for perfecting the delivery, such unconditional order to the vendee, and its delivery to the warehouseman, puts an end to the *transitus*. That position is established by *Harman v. Anderson*, the authority of which cannot be questioned; and though two cases look the other way, they are distinguishable, and do not infringe the general proposition. In one of them there was no lodgment of the delivery

order; in the other the goods remained in the possession of the vendor, and neither at the time of the sale were they in a distinct warehouse, nor were they transferred to one after it; they remained in the possession of the vendor, and he did not contemplate the lodging of the delivery order. It was considered sufficient that he should say "I hold thirty-nine pipes of wine for the vendee." It therefore appears that whatever conclusion is to be drawn from that case, there is nothing in it trenching on the doctrine of *Harman v. Anderson*. On this part of the case I entertain no doubt.

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But I own that on the second part of it there would appear much difficulty, if it had not been the subject of previous decision. What is the meaning of the delivery order? It is clear that it is not a mere naked order for delivery; that something is to be done is clear; that something is the payment of duty; the goods are in the Queen's store. The delivery order was to deliver the goods on certain terms, and the storekeeper with whom it was lodged may be considered the agent of the collector to whom it was addressed. If it were merely an order to deliver, it is within the authority of *Harman v. Anderson*. But something is to be done; and it would appear a grave question whether the distiller in Scotland, who, notwithstanding the lodgment of the delivery order in Newry, continued liable to the duty, intended to divest himself of the possession of the whiskey until the duty was paid by the vendee? On this part of the case I felt much difficulty, and was inclined to think that the right of stoppage should continue until the vendor was completely indemnified, and but for the case of *Haig v. Wallace* I should still hesitate to hold the reverse. But I cannot distinguish the order in this case from that in *Haig v. Wallace*—[reads it].—If there be a condition here, there was so there, but the Court of Queen's Bench considered it a mere statement of the liability which the vendee would be under, whether those words were in the order or not. That construction being put on these words more than twenty years ago, and having been adopted in subsequent decisions, we ought not to shake the course of dealing sanctioned by so long time; and more especially, as if we make a mistake in following that decision it may be corrected by a superior tribunal. It is therefore safer to follow the decision in

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 MURDOCK. award a *venire de novo*, in which case our decision could not be
 canvassed, and the course of commercial dealing in these matters
 would be disturbed. The exceptions must therefore be overruled.
 I did not think it right to let the wording of the instrument pass
 without comment, entertaining no doubt of the effect of an *uncondi-*
tional order.

LEFROY, B.

I, with my Brother PENNEFATHER, wish to express my sense of
 the full and satisfactory manner in which the CHIEF BARON has
 gone through the authorities bearing on this case; so much so,
 that it will not be necessary for me to follow in the same line.
 But the importance of the case is not only an apology, but requires
 that I should express the general grounds of my assent to the
 ruling of the Court. I own I for a considerable time felt great
 doubt, and my judgment is not in accordance with my first impres-
 sion. My grounds of doubt were two—first, the apparent conflict
 of authority between *Haig v. Wallace* and *Northey v. Field*; and
 if these cases were alike in their circumstances, from early preju-
 dice I should be disposed to follow the authority of Lord Kenyon;
 but there is a substantial distinction between them, on more accurate
 consideration. In *Northey v. Field* Lord Kenyon says:—"In the
 present case," &c.—[cites the judgment.]—In that case it appears as
 if the vendor designed to reserve the security of his right to stop
in transitu until the duties were paid; at the same time that he con-
 signed the goods to the vendee, he sent the bill of lading to his own
 correspondent, and gave no delivery order to the vendee; and the
 vendee's right arose simply from the fact of the sale, and from the
 law which (as it existed then) provided that the goods should remain
 twenty days on board ship to give the owner an opportunity of pay-
 ing the duties, by which alone he could obtain possession. I conceive
 therefore that Lord Kenyon, when he considered the right of
 stoppage *in transitu* to be open then, so held on this ground, that
 the *only* authority to the vendee to receive the goods was on the
 payment of the duty; that the goods were meanwhile *in custodia*

legis, and that there existed no means of his obtaining a symbolical delivery except by payment of the duty. But this right may be put an end to by symbolical as well as actual delivery; and here an instrument is given which I think amounts to a symbolical delivery. The question on the instrument is, whether it was part of the contract that the vendor should reserve to himself, as in *Northey v. Field*, the right of stoppage *in transitu* until the duties were actually paid? He transmitted to the vendee a bill of lading which carried the property to him, and also a document which enabled him at once to transfer to himself the possession, unless it contained a condition suspending that power. What could be the purpose of giving that order, if it were merely to leave the parties in the same position as they would have been by the law, if it only conferred on the vendee the right to obtain possession on payment of the duties? We must suppose that some authority was intended to be given by the delivery order. If it was intended as a symbolical delivery, then the right of possession passed by it; and this is a more rational construction than to suppose that it was intended to suspend the right of possession in the party having the right of property, until the payment of the duty. I therefore think, though it is not my first impression, that the Queen's Bench gave the true construction to the delivery order in *Haig v. Wallace*, and that the effect of it is to say—I put the party in my position, he rendering to the Crown that duty to which I am obliged. Taking this view of the decision of the Queen's Bench, I do not think it conflicts with *Northey v. Field*, nor that the contract is conditional. The parties have only expressed what the law would have implied, that is, a design to give a symbolical possession, leaving the goods in the custody of the Crown as a security for the duty, and adopting the form of delivery order prescribed by the Act of Parliament.

The next question is, whether by the act of simply lodging the delivery order with the officer, without a transfer of the goods in the excise books, the vendee obtained that symbolical possession? *Harman v. Anderson* is an authority on that point. On the whole then I am of opinion that the right of stoppage *in transitu* was at

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an end. There was such a delivery as determined it, the more so as the order was not only lodged but acted on. There remained nothing to be done on the part of the vendor, and nothing on the part of the vendee as between him and the vendor. All that remained was as between the vendee and the Crown, and cannot be held to suspend the delivery, which was complete by the act of both parties. I therefore think the direction of the LORD CHIEF BARON was right.

Exceptions overruled.

TAAFFE *v.* RUTLEDGE.

Nov. 15.

Writ of summons was in trespass on the case; declaration in trespass. *Held*, that the declaration must be set aside for variance, under the Practice and Process Act.

Held also, that the writ could not be amended under the 3rd section of that Act, even though the Statute of Limitations might be pleaded to a new action.

JORDAN moved, on behalf of the defendant, that the declaration in this case be set aside, on the ground that the form of action stated in the writ of summons was trespass on the case, while the declaration was in trespass.

LEFROY, B.

The variance is fatal, and the declaration must be set aside.

Burke, for the plaintiff, admitted that the declaration must be set aside, but applied that the writ might be amended by striking out the words "on the case," under the special circumstances that if the plaintiff be obliged to issue a new writ, the Statute of Limitations might be relied on as a bar to the action. Counsel also submitted that the Court had the power of making the required amendment under the 3rd section of the Practice and Process Act, which enacts *inter alia* that "it shall be lawful for the said Superior Courts of Law respectively, or any Judge or Baron thereof, to decide and determine what is a verbal or technical error or omission in any such writ (that is, writ of summons issued under the authority of

“that Act), and to amend or authorise the amendment thereof; but
 “all errors or omissions which have not a manifest tendency to mis-
 “lead the opposite party shall in all cases be deemed merely verbal
 “or technical.”

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Jordan.

The plaintiff has remained passive for four years, and therefore is not entitled to any indulgence. The Court has no power to make the amendment in the writ asked for by the plaintiff under the 3rd section of the Practice and Process Act.

LEFROY, B.

I consider the error in the writ of summons to be substantial, and not either “verbal or technical,” within the meaning of the 3rd section of the Practice and Process Act. Besides, by making this amendment I might deprive the party of the defence of the Statute of Limitations, which has been expressly provided by the Legislature for actions of this kind after four years have elapsed from the trespass. The plaintiff, after having suffered so long a time to elapse without bringing his action, cannot now complain if he be barred by the Statute of Limitations in any new action he may be advised to bring.

Let the declaration be set aside.

EARL OF ORKNEY v. DWYER.

Nov. 20.

DEBT, for use and occupation.—A conditional order to change the venue had been obtained on the common affidavit.

Venue may be changed in debt for use and occupation.

Acheson Henderson now moved the Court to set aside the conditional order, and contended that in this form of action the venue

Gore v. Gore
(*Smythe's R.*
244) overruled

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cannot be changed on the common affidavit : *Gore v. Gore* (a). The sum sought to be recovered is certain, and no jury is required to assess the damages : *Duplessis v. Chalk* (b) ; *Pratt v. Ward* (c).

Meagher.

The case in the Common Pleas would go to this, that in no case of debt can the venue be changed, as in no case can the jury be called on to assess damages ; but the rule is, that in all cases where the venue is transitory, the plaintiff may lay the venue where he pleases, and the defendant may then have it changed to the place where the cause of action arose, if that be ascertainable ; but in actions of debt on a demise the venue cannot be changed, as there the cause of action has no locality : *Herring v. Watts* (d). There is no difference in actions of debt and assumpsit for use and occupation, as to the mode of changing the venue.

Henderson, in reply.

Herring v. Watts is an unsatisfactory case. Neither *Gore v. Gore* nor *Pratt v. Ward* are referred to in it. The question is, whether the Court will follow the Irish or the English practice ?

PIGOT, C. B.

Not exactly that, for the dictum of Burton, J., in *Pratt v. Ward*, is founded on the case in *Strange* ; and the case in the Common Pleas (*Gore v. Gore*) is founded on that dictum. The Common Pleas appear to have been under the impression that the Queen's Bench had decided the case of debt for use and occupation, whereas the case adjudicated upon was debt on a demise for rent.

Per Curiam—Let the order be made absolute.

(a) Smythe's Rep. 244.

(b) 2 Str. 878.

(c) Al. & Nap. 145.

(d) 7 M. & G. 1018 ; S. C. Dow. & Low. 609.

NOTE.—In *Wise v. Beresford*, not yet published, the Queen's Bench overruled the case in *Smythe*, and changed the venue in an action of debt for use and occupation.

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DEERING and O'HARA, Executors of GILDEA,

v.

MAHON.

(*Common Pleas.*)

Nov. 7.

LYNCH (with whom was *J. G. Holmes*), on behalf of the defendant, moved that the present action and all further proceedings in this cause might be stayed, pending an inquiry directed by an order of the Court on the 13th of June 1851. The facts of the case as they appeared by the affidavits used on the motion were as follows:— On the 8th of May 1851 a writ of *fi. fa.* issued to the defendant as Sheriff of the county of Mayo, in a cause of *John Evans v. Anthony Gildea*, endorsed for the sum of £1421, and under which he seized the furniture in the residence of the latter; and also cattle on the adjoining land. On making the seizure he was served with a notice by the plaintiff Deering, as executor of Robert Gildea, claiming the cattle and part of the furniture, and by Francis Gildea, brother of the defendant in execution, claiming the rest of the furniture; and having applied under the Interpleader Act, by an order of the Court of Queen's Bench, made on the 25th of June 1850, an issue was directed to be tried between Francis Gildea and John Evans, to ascertain the title to the furniture claimed by the former. Evans having declined to take any issue with Deering as to the cattle and furniture claimed by him, the order directed them to be returned. The issue between John Evans and Francis Gildea was brought down for trial at the Summer Assizes 1850 for the county of Mayo, but was then compromised, and the goods by consent of both parties

Goods were seized under a *fi. fa.* by the Sheriff, in the house of A.

B and C having claimed the goods, the Sheriff applied under the Interpleader Act 9 & 10 Vic. c. 64, when it was ordered by the Court that an issue should be tried between B and the execution creditor; and the latter declining to take any issue with C, the goods claimed by him were directed to be restored. The issue between B and the execution creditor terminated in a compromise, pursuant to which the goods were sold. B having applied that the Sheriff might pay over to him the money in

his hands, a reference was granted (C appearing on the motion) to ascertain the expense incurred by the Sheriff in keeping the goods, and also certain cattle the property of C. *Held*, that under these circumstances the Court could not stay an action of trespass brought by C against the Sheriff, but might confine the cause of action to acts of unnecessary violence not incidental to the original seizure.

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sold. Evans having afterwards applied by motion to the Court of Queen's Bench that the Sheriff might pay him the proceeds of the sale (on which motion the plaintiffs appeared), the order of the 13th of June 1851 was made, whereby it was referred to the officer of the Court to ascertain the expense incurred by the Sheriff in keeping the cattle, with a direction that Evans and Francis Gildea should be charged with so much as was incurred from the 22nd of May to the 31st of May, when Francis Gildea withdrew his claim, and Evans with so much as was incurred from the 31st of May to the 12th of June, and to inquire whether the cattle remained in the possession of the Sheriff from the plaintiffs' default, in which event the Sheriff should have credit against the plaintiff for the expense incurred thereby.

The declaration in the present cause was filed on the 25th of June 1851, and contained four counts in trespass.

The first count was for seizing certain cattle and detaining them, whereby they were damaged.

The second count was for seizing, taking and driving away the plaintiffs' cattle, and disposing of them.

The third count alleged that the defendant seized and took, *and then and there forced and broke open, and broke to pieces and damaged*, divers goods and chattels (enumerating different articles of furniture).

The fourth was a count *de bonis asportatis*.

Lynch, for the defendant, now contended that the subject of the present action had been already adjudicated on by the interpleader order, and that the Court would not permit a second action to be instituted for the same cause. That the plaintiffs, by appearing when the Court made the order of the 13th of June 1851, had waived any right they might have had to bring the present action. He cited *Tinkler v. Holden* (a); *Jessop v. Crawley* (b); *Cater v. Chignell* (c); *Leahy v. Malcomson* (d).

(a) 4 Exch. 187.

(b) 15 Q. B. 212; S. C. 19 Law Jour. N. S., Q. B. 320.

(c) 15 Q. B. 217; S. C. 19 Law Jour. N. S., Q. B. 520.

(d) 3 Ir. Jur. 235.

Sproule and *R. M'Cauleland*, for the plaintiffs.

The second count of the declaration is for acts of unnecessary violence committed by the Sheriff in the execution of the writ, such as breaking open the plaintiffs' boxes ; and the case of *Jessop v. Crawley*, cited on the other side, shows that an adjudication under the Interpleader Act will not prevent the plaintiff from maintaining an action where he can show some excess of violence by the officer. The application is moreover irregular, as it should have been to the *magistrate* in which the interpleader order was pronounced.

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Holmes, in reply.

The interpleader order would not protect the Sheriff in the present action from the consequences of the illegal seizure. We would be estopped from denying the illegality of the seizure, as the order shows that the goods were restored to Deering. We are willing to have an action on the case brought for any consequential injury which the goods may have received.

MONAHAN, C. J.

I am of opinion that we cannot stay the present action, and that the plaintiffs are entitled to recover damages for any injury which the goods may have sustained subsequent to the seizure, but not to seek damages for the original seizure, or any matter incidental thereto. But though we cannot stay the present action, we can make an order regulating the question to be tried.

TORRENS, J., BALL, J., and JACKSON, J., concurred.

The following order was made:—

No rule on the motion ; the plaintiffs by their Counsel undertaking to confine their action against the defendant to injuries unnecessarily done by him the said defendant to the furniture of the plaintiffs while the same was in his custody, and not for any necessary act done by him the said defendant in the due and proper discharge of his duty as Sheriff in seizing and detaining the said goods.

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Common Pleas.

SOPHIA MAJOR

v.

HUGH WILLIAM BARTON and MARY his wife.

Nov. 18.

The statute 14 & 15 Vic. c. 20 (extending the remedies provided by the Renewable Leasehold Conversion Act for the recovery of fee-farm rents under that Act to all other fee-farm rents, and to other rents in Ireland, reserved upon grants of land, in which the grantor has no reversion) applies to a replevin proceeding at the time of the statute.

REPLEVIN, for taking the plaintiff's cattle in a close called the demesne lands of Kilmanedon.

Second avowry by the defendants, in right of Mary Barton ; Because they say that the said close, &c., in which and soforth, was amongst other premises, for the space of two years next before, and ending on the 1st of November 1850, and from thence hitherto has been, and still is, held under a certain grant thereof, at a certain fee-farm rent, payable under the said grant to Thomas Nesbitt the grantor therein named, and to his heirs and assigns, to wit the yearly rent of £80. 5s., late currency, equivalent to £74. 1s. 6d. of the present currency ; and because the sum of £160 of the late Irish currency, equivalent to, &c., for the space of two years, ending as aforesaid on the said 1st day of November 1850, and from thence until and at the said time when and soforth, was due and in arrear, they the said defendants, in right of the said Mary, well avow the taking of the said cattle, goods and chattels in the said close in which and soforth, as and for and in the name of a distress for the rent so due and in arrear as aforesaid, and which still remains due and unpaid. And the said defendants aver that they the said defendants, in right of the said Mary, are entitled to the same.—*Verification.*

The defendants also pleaded three cognizances, which were in the same form, *mutatis mutandis*, as the above avowry.

General demurrer to the first, second and third cognizances, and joinder.

The points noted for argument by the plaintiff were, that there was no reversion shown in the persons in whose right the defendants purported to avow and make cognizance, and that the provisions of

the 14 & 15 *Vic.* c. 20, did not apply to the case of a distress made or a replevin brought before the passing of that Act.

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Norman, in support of the demurrer.

The question in this case is, whether the provisions of the Act 14 & 15 *Vic.* c. 20, which came into operation on the 3rd of July 1851, were intended to apply to a case like the present, in which the seizure was made on the 30th of April 1851, and the declaration in replevin filed on the 12th of June 1851? The general rule in construing statutes is, that they shall only operate prospectively from the time they came into force, in accordance with the maxim, "*Nova constitutio futuris formam imponere debet, non præteritis.*" The Act under consideration recites the 12 & 13 *Vic.* c. 105, which enabled parties to avow generally in cases of distresses for rents made payable on fee-farm grants under that Act; and then it enacts that the provisions of that Act "shall henceforth extend to "all fee-farm grants, and also to other rents reserved and payable "under any grants, conveyances or written instruments granting, or "containing agreements for granting, any lands, tenements or hereditaments in fee-simple, or for a life or lives and a term of years, "or for a life or lives concurrent with a term of years, and reserving, "or purporting to reserve thereout, rent payable to the grantor or "party agreeing to make such grant, or to his or their respective "representatives, where the person to whom such rent is or shall be "payable has or shall have no reversion in the said lands."

An avowry under the former Act should state that the fee-farm grant was made after the passing of that Act. It cannot have been intended that this form of avowry should be extended to fee-farm grants made prior to the passing of the Leasehold Conversion Act, which would be the effect of the construction which will be contended for on the other side.—[MONAHAN, C. J. The former Act could not be retrospective, and therefore it is necessary in avowing under that Act to state the grant was made after the passing of the Act; but the 14 & 15 *Vic.* c. 20, recites that it is expedient to extend such remedies and powers to all fee-farm grants, and therefore it is unnecessary in avowing now in respect of any fee-farm

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grant to state when the deed of grant was executed, an avowry under the latter Act being applicable to fee-farm made before as well as after its passing.]—The words “shall henceforth” must mean from the day of receiving the royal assent. The case of *Towler v. Chatterton* (a) is distinguishable; that was decided on the construction of the 9 G. 4, c. 14 (Lord Tenterden’s Act), which the Court held to apply to the case of an oral promise made before the passing of the Act; but the words of that Act were different from those of the statute under consideration, and the Court relied upon the fact that the Act was not to come into operation for upwards of seven months after it had received the royal assent, thereby giving all persons to whom parol promises had been made time to bring actions founded on such promises. In *Marsh v. Higgins* (b) the Bankrupt Act 12 & 13 Vic. c. 106 was held not to have a retrospective effect, and the Court held that statute should not have a retrospective effect unless there were express words to that purpose; and in the present case we would be entitled, in the absence of the provisions of this Act, to have the defendants’ title fully deduced in the avowry, and a retrospective construction will have the effect of depriving us of a vested right.—[MONAHAN, C. J. Your right was that no person should distrain but the person entitled to do so; but as to the form in which the defendant should defend his act, that is a mere question of pleading.]

The following authorities were cited: *Pickup v. Wharton* (c); *Freeman v. Morges* (d); *Handcock v. Handcock* (e).

Hunter (with whom was *Brooke*) cited *Hitchcock v. Way* (f).

Sproule, in reply.

The provisions of the statute under consideration do not merely relate to the form in which the defendant shall plead: previous to passing of this Act the defendant who avowed the act of distress should prove his title to do so. Now a triennial receipt of rent is

(a) 6 Bing. 258.

(b) 19 Law Jour., N. S., C. P. 297.

(c) 2 C. & M. 405.

(d) 1 Ad. & El. 338.

(e) 1 Ir. Chan. Rep. 444.

(f) 2 N. & P. 72.

made sufficient. All the previous Acts relating to replevins and ejectments are held to be prospective. *Cod. Civilis*, lib. I; *The King v. The Hungerford Market Company* (a).

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MONAHAN, C. J.

In this case we do not entertain any doubt as to the decision which we ought to pronounce. We fully agree in the propriety of the rule which has been laid down in the course of the argument, that every Act of the Legislature should be so interpreted as not to alter the rights of parties as they existed previously, unless the statute contains express words to that effect. But in the statute now under consideration, there is an express enactment that all the powers, provisions and enactments referred to and contained in certain recited sections of the Leasehold Conversion Act shall henceforth extend and be applicable to all fee-farm rents—words which are large enough to embrace the present case. The plaintiff's Counsel, by the interpretation which they seek to put upon the statute, require us to insert the words "save as to pending suits." It may be sufficient to say that these words are not in the statute, and that we do not feel ourselves at liberty to interpret it as if they were; but it may further be observed, that the provisions of this statute do not interfere with any vested rights, as the object of it was merely to save the expense of pleading the title specially, and enabling him to avow in the general manner prescribed by the Act.

TORRENS, J., BALL, J., and JACKSON, J., concurred.

Demurrer overruled.

(a) 2 B. & Ad. 204.

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Common Pleas

In the Matter of the Estate of
 CHARLES O'BRIEN MASSY.

Nov. 18.

The Court for the Sale of Incumbered Estates in Ireland have not jurisdiction, under the 12 & 13 Vic. c. 77, s. 16, to sell a perpetual annuity, granted by a lessee holding for lives renewable for ever.

THIS was a case sent by the Commissioners for the Sale of Incumbered Estates in Ireland for the opinion of the Court of Common Pleas.

By indenture of the 9th of April 1796, Charles Massy granted to Frederick Massy, his heirs and assigns, a perpetual annuity or yearly rentcharge of £50, charged upon several denominations of land therein mentioned, of which the said Charles Massy was then seised, for three lives, with covenants for perpetual renewal under certain indentures of the 25th of August 1787, and the 1st of May 1758.

Charles Massy died, and his interest under the lease of the 25th of August 1787 became vested in George Gubbins, who obtained a renewal in the year 1845 for a further term, which term was still subsisting.

Frederick Massy also died, and the rentcharge granted to him became vested in Charles O'Brien Massy, who presented a petition for the sale of this, amongst other denominations of property, in the Court for the Sale of Incumbered Estates.

The question proposed by the Commissioners was, whether, under the 12 & 13 Vic. c. 77, they had jurisdiction to sell such an annuity?

C. H. Woodroffe, for the petitioner in the Incumbered Estates Court.

The 16th section of the 12 & 13 Vic. c. 77, enacts, "That where
 "land in Ireland, or a lease in perpetuity, or any lease for a term
 "whereof not less than sixty years shall be unexpired at the time
 "of such application as hereinafter mentioned, or any church or
 "college lease of land in Ireland, shall be subject to any incum-

“brance, it shall be lawful for the owner of such land or lease, within three years from the passing of this Act, to apply to the Commissioners for a sale of such land or lease under the provisions of this Act.” The perpetual annuity, in respect of which the petitioner seeks an order for a sale, is within the term “land” in this section. Land is defined by the 54th section to include rents and hereditaments. This annuity is a fee-simple personal, and as such is a hereditament: it is forfeitable for treason. It is not necessary to the creation of a fee that there should be a conveyance of the soil. If an estate be alienable at the will of the holder, descendible to heirs general, and liable to forfeiture for treason, it possesses all the incidents of a fee-simple estate. But, secondly, this is a rent within the meaning of the interpretation clause of the Act, and as such the Commissioners are entitled to sell it.—[MONAHAN, C. J. The whole question turns upon the construction to be given to the 16th section of the Act. The context shows that the word “lands” must be necessarily intended to mean fee-simple lands; for it takes a distinction between lands and leases. If therefore you substitute “rent” for “land,” as you suggest, the section can only apply to a fee-simple rent; and taking this as a rent issuing out of land, it is not a rent in fee, for it issues out of leaseholds for lives, and it cannot be of greater duration than the interest out of which it issues. If on the other hand you treat it as not issuing out of land, but as an annuity personal, it is not land in Ireland, and therefore not within the scope of the Commissioners’ jurisdiction, which is for the sale of land in Ireland.]

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The following cases were cited:—*Chudleigh’s case* (a); *Butt’s case* (b); *Nevil’s case* (c); *Turner v. Turner* (d); *Stafford v. Buckley* (e); *Hassell v. Gowthewaite* (f); *Bearpark v. Hutchinson* (g); *Richardson v. Nixon* (h).

No Counsel appeared to oppose the case of the petitioner.

Cur. ad. vult.

(a) 1 Rep. 113.

(c) 7 Rep. 33, a.

(e) 2 Ves. 171.

(g) 7 Bing. 178.

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(b) 7 Rep. 23, a.

(d) Ambler, 777.

(f) Willes, 500.

(h) 7 Ir. Eq. Rep. 620.

5 L

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In re
MASSY'S
ESTATE.

The Court afterwards sent the following certificate:—

“ We have heard this case argued by Counsel for the petitioner,
“ no Counsel appearing for any other party, and considered it ; and
“ we are of opinion that the Commissioners for the Sale of Incum-
“ bered Estates in Ireland, under the 12 & 13 *Vic.* c. 77, have not
“ power to sell a perpetual annuity or rentcharge, charged on land
“ held under a lease for lives renewable for ever.”

“ JAMES HENRY MONAHAN. “ NICHOLAS BALL.

“ ROBERT TORRENS. “ JOSEPH D. JACKSON.”

ROBERT DELAHAY

v.

CHARLES KELLY and ALFRED KELLY.

Nov. 22.

The Court will not compel an insolvent to give security for costs in an action by him against his assignees, where it appears to be brought *bona fide* for the purpose of trying a substantial question of property.

E. M. KELLY, on behalf of the defendants, moved that the plaintiff might be compelled to give security for costs, and that in the meantime all further proceedings in the present action might be stayed.

It appeared by the affidavit of the defendant Charles Kelly, that the plaintiff was, on the 16th of March 1850, discharged as an insolvent, and that on the 5th of July succeeding, the defendant Alfred Kelly was appointed his assignee ; that on the 19th of August following, the defendant, as such assignee, took possession of a farm which the insolvent had returned in his schedule as being in his possession, and also certain crops of oats and wheat growing on the lands, the insolvent having previously disposed of a crop of bere which he had also returned in his schedule. The affidavit further stated that the subject-matter of the present action was the oats and wheat so taken by the defendants, and that the plaintiff had not, to the deponent's belief, any just or *bona fide* cause of action against the defendants ; that the plaintiff was in insolvent circumstances, and unable to pay the costs of the action, in the event of its resulting in a verdict for

the defendants; and that the deponent believed that the action was brought vexatiously, for the purpose of compelling the defendants to compromise it, by paying money to avoid the expense of defending the action. No affidavit was made by the plaintiff. The declaration in the present case was in trespass *de bonis asportatis* for the removal and conversion of oats and wheat alleged to be the property of the plaintiff.

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E. M. Kelly, for the defendants.

It is not denied that the property, the subject of the present action, passed to the defendant Alfred Kelly upon the plaintiff's insolvency, as it must be taken that the present action relates to the crops taken by the defendant as assignee. In *Lessee Henderson v. Hoghan* (a), the defendant was compelled to give security for costs, where he had taken defence to an ejectment for non-payment of rent, on the ground that he was a mere cottier, and that he had taken defence at the instigation of a third party; and the same principle is laid down in 2 *Ferguson's Practice*, p. 905. In the present case the action of trespass arose after the defendant's appointment as assignee: the plaintiff would, therefore, not be entitled to the fruits of the action, which therefore cannot be considered to be promoted by him. If an insolvent proceed with an action after executing an assignment of his effects, although no assignees are appointed, the Court will compel him to find security for costs: *Doyle v. Anderson* (b); *Heaford v. M'Knight* (c).

Meagher, for the plaintiff.

There is no instance in which the Court has restrained an action brought by a pauper to try a substantial question like the present. It is not denied that if an action be originally brought by the insolvent, and continued by his assignee, or if an action at the suit of a pauper be instigated by a third party, the Court will compel a plaintiff to give security for costs, on the ground that a party is not to be put forward as plaintiff in an action which is not substantially

(a) 1 Ir. Law Rep. 261.

(b) 2 Dowl. P. C. 596.

(c) 4 D. & R. 81; S. C. 2 B. & C. 579.

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his own. But in the present case the plaintiff disputes the right of the assignee to the property in question ; and the Court will not pre-judge the merits of the case. If the present action is to be stayed, it will be tantamount to saying that in no case can an action be brought by an insolvent against his assignee.

E. M. Kelly replied.

MONAHAN, C. J.

This is an application to compel the plaintiff, being an insolvent, to give security for costs in an action brought by him against his assignee, to try the title of the latter to property which was taken by him in that capacity. No authority has been cited for such an application. There is no statement in the defendant's affidavit to the effect that the crops in question were growing on the land at the time when the defendant filed his schedule or obtained his discharge ; and for all that appears to us, the crops may have been sown by the plaintiff subsequent to the vesting order. We are not called upon to say whether in such a state of facts an action such as the present is maintainable by the plaintiff for the seizure and sale of these crops. It is sufficient for us to say that the action appears to be brought *bona fide* by the plaintiff for his own benefit, for the purpose of raising what may be a question of some difficulty ; but neither on principle or authority do we consider that we can oblige the plaintiff in such an action to give security for costs. The attempt is one of the first impression, and the motion must therefore be refused, with costs.

TORRENS, J., BALL, J., and JACKSON, J., concurred.

Motion refused, with costs.

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Queen's Bench

CHADWICK v. ATKINSON.

(*Queen's Bench.*)

Nov. 4, 7, 21.

A writ of *capias ad satisfaciendum* having issued against the defendant on foot of a judgment obtained against him in a cause of *Fottrell v. Atkinson*, and he having been arrested thereunder, he tendered to the plaintiff in that cause the amount for which he had been arrested, but the plaintiff refused to receive it, unless the amount of the Sheriff's poundage was also paid. An application was then made to PERBIN, J., in Chamber, for the defendant's discharge from custody; and on the 8th of August 1850, it was ordered that on the defendant lodging to the credit of the cause the sum of £2862. 9s. 3d., being the full amount of plaintiff's demand for debt and costs, with interest, and also a promissory note for £73. 13s. 10d., the amount of the poundage to abide the decision as to the defendant's liability to the poundage, that the defendant be thereupon discharged from custody.

A defendant arrested under a writ of *ca. sa.* is not liable to be detained in custody until the Sheriff's poundage be paid, after tendering the amount and costs of the judgment.

Cowper v. Gould (2 Jo.)
 dissented from

An action of debt on the promissory note having been brought under the direction of the Court by the Sheriff against the defendant for the amount of the note, it being part of the order that the plaintiff should admit in such action that the consideration for the note was the Sheriff's poundage, claimed on the arrest of the defendant, the questions to be tried were, whether the defendant was liable to the Sheriff for the poundage? and whether he was liable to be detained by the Sheriff for said poundage?

An action was accordingly brought, and the cause was tried in the After-sittings of Michaelmas Term 1850, before the LORD CHIEF JUSTICE, who directed a special verdict in accordance with the above facts.

The case being now set down—

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P. O'Brien (with *J. D. Fitzgerald*) were heard for the plaintiff.

This question of liability to the Sheriff arises on the statute 6 *Anne*, c. 7.* At Common Law Sheriffs were not entitled to fees; and it was not until the passing of 10 *Car.* 1, sess. 3, c. 19 (*Ir.*), that the Sheriff's right to poundage was recognized. That was followed by 6 *Anne*, the 2nd section of which enacts, that if any Sheriff demanded or received fees for more than appeared to be due by the certificate directed by the 1st section to be lodged, then he was to

* 6 *Anne*, c. 7, s. 1, enacts:—"That no Sheriff or other officer having execution of writs shall, from and after the 6th day of November 1707, receive or demand fees for executions either on judgments, statutes, or otherwise, for more than what the party, at whose suit the execution issues, or his, or her, or their attorney or agent, shall, under his or her hand, certify to be justly due to him or her thereon; and that at the time any writ of execution shall be demanded or called for in any office in this kingdom, whence such execution is to issue, the party demanding the same shall lodge with the officer a writing or certificate, under the hand of the party or parties for whom such execution is demanded, or of his attorney, containing such sum as the party, at whose suit such execution shall issue demands and insists on to be in good conscience due to him after all equitable deductions that ought to be made out of the sum for which the said judgment is given; which certificate shall be filed in the said office; and the sum therein contained shall be entered in the book where the executions are entered, and also on foot of the writ of execution that shall issue; for all which the fee of twelve pence and no more shall be demanded or taken: and that no Sheriff or other officer, having execution of writs, shall, from and after the said 6th day of November 1707, levy any other or greater sum, or demand or receive more fees on such executions than for such sum as shall be so entered on the foot of such execution, notwithstanding such execution shall contain a greater sum than is so entered on the foot thereof; and that no execution shall be executed, at the foot of which such entry shall not be made as is aforesaid."

Section 2 enacts:—"That in case on any such execution the Sheriff or any other officer having execution of writs as aforesaid, shall, after the 6th of November 1707, demand or receive fees for more than appears to be due by such certificate, that such Sheriff or under officer shall be liable to the action or suit of the party against whom such execution issues, and shall forfeit and answer to the said party his, her or their double damages; and that if the party or parties at whose suit such execution shall issue, or his, her or their attorney or agent, shall neglect or omit to deliver an attested copy as aforesaid of such certificate, together with such writs of execution, or shall appear wilfully, fraudulently and maliciously to have overcharged the party against whom such execution issues in such certificate given in or made by them, that the party at whose suit such execution issues shall, as aforesaid, forfeit and answer the party grieved his, her or their treble damages; which said execution shall be marked with the sum contained in the said certificate by the proper officer issuing such execution."

be liable to the action or suit of the party against whom the execution issued, and pay double damages. That section also gave a remedy against the party at whose suit the execution issued, if he neglected to deliver an attested copy of the certificate. That statute, whether it be declaratory or enacting, has been held to render the defendant liable.

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The 10 *Car.* 1, sess. 3, c. 19, declares the poundage to which the Sheriff is entitled, viz., twelve pence for every twenty shillings, if the same do not exceed £100, and six pence for every twenty shillings over and above £100; and the penalty against the Sheriff for taking more is that he shall "lose and forfeit to the *party grieved* "his treble damage, and shall forfeit the sum of £40 of good and "lawful money" for every offence against the Act. The statute of *Anne* gives the remedy against the Sheriff to the party against whom the execution issues, which clearly implies that he is the person liable for the Sheriff's fees. The statute of *Car.* gives it to the "*party grieved*," which may be either the plaintiff or the defendant in the execution.

But whatever be the construction of the words "party grieved," in the statute of *Charles*, it is plain that the enactments in the statute of *Anne* apply to the defendant in the execution; and that has been judicially recognised in *Cowper v. Goold* (a). The result is stated by Pennefather, B.:—"We are all quite satisfied, upon the "construction of the 6 *Anne*, c. 7, that the defendant is the person "liable to pay the poundage to the Sheriff;" and so Joy, C. B., says: "The Act admits that the sheriff may levy and receive poundage on "the sums marked on the execution; and as the poundage is to be "levied, it must be off the party against whom the execution has "issued." If the poundage was not to be levied from the defendant, should the statute give him a right of action? In *Hill v. Buchanan* (b), it was held that a Sheriff may maintain an action for his fees for executing a *ca. sa.* against either the plaintiff or defendant in the original cause: *Bagot v. Malone* (c); *Barton v.*

(a) 2 Jones, 475.

(b) Ir. T. R. 553.

(c) 5 Ir. Law Rep. 454.

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Seymour (a); *Dunne v. Thorpe* (b). *Hayley v. Racket* (c) shows the practice in England to be, that a Sheriff has no right to take poundage from a defendant on the execution of a writ of *ca. sa.*, Parke, B., observing :—" But on a writ of *ca. sa.* the Sheriff has no "right to levy poundage from the defendant. His duty is merely to "take the party, and have his body before the Court at the specified "time, in order to satisfy the plaintiff's demand." In this country the practice is different.—[MOORE, J. In the case of the execution of a writ of *habere*, could the defendant be made liable for the fees under the statute of *Anne* ?]—By an action of mesne rates he might be rendered liable.—[MOORE, J. The Sheriff could not maintain that action.]

S. Ferguson and Napier, contra.

In *Hill v. Buchanan*, *Bagot v. Malone*, and indeed in all the cases in Ireland, the action was brought against the plaintiff in the execution ; how then can it be argued he is entitled to hold the defendant in the execution in custody until the Sheriff's poundage be paid ?—[BLACKBURN, C. J. The Court of Exchequer have, in *Cowper v. Goold*, decided that the marshal of the marshalsea should keep him until the fees be paid.]—The marshal in that case took the money and discharged the prisoner, which should not have been done without an order of the Court or on consent of the party ; but that case in principle has not since been followed. The error in it is in applying the word "levy" to the Sheriff's poundage. The statute of *Anne* does not give the right to the poundage ; that is provided for by the statute of *Charles*. The two statutes must be read together ; and so it will be found that the statute of *Anne* regulates rights but does not create them, and that the statute of *Charles* originates the right, but does not enable a levy to be made under it.—[PERRIN, J. It is settled that the plaintiff in an execution on an *elegit* is liable in an action for the fees. I have a strong impression there is some mistake in the wording of that 2nd section of 6 *Anne*.]—On the analogous Act in England, 3 *G.* 1, c. 15, it has been held that the Sheriff is entitled

(a) 1 H. & B. 304. n.

(b) B. D. & O. 128.

(c) 5 M. & W. 620.

to poundage on the debt: *Peacock v. Harris* (a): and that the plaintiff in the execution is the person to pay: *Crozier v. Pilling* (b).—[BLACKBURN, J. Admittedly in England the plaintiff has been held liable.]—The statute of 29 *Eliz.* c. 4 in England, and 10 *Car.* c. 19 in this country, though they contain some discrepancies, yet they establish that what was law in England before the statute of *Anne* was also law in Ireland. Any inference, therefore, from the statute of *Anne* must be clear and explicit. The marginal note in *Hill v. Buchanan* is incorrect, for the practice in England is not as there stated; at all events, that case decided that the plaintiff in the execution was liable for the fees. It is the plaintiff who puts the Sheriff in motion, and the writ is executed for his benefit and on his behalf: *indebitatus assumpsit* will lie for the fees of the Sheriff: *Stanton v. Suliard* (c); and in *Bagot v. Malone* (d), PERRIN, J., says:—"I am at a loss to know why *indebitatus assumpsit* could not be brought; why he has not declared for his fees and poundage upon an execution executed by him for the benefit of the defendant." Fees were considered lawful both by the statute of *Eliz.* and of *Car.* The statute of *Anne* deals solely with the defendant in the execution; but a case might arise where the defendant in the execution was not liable for fees, and yet the Sheriff might have enforced them against him: *Woodgate v. Knatchbull* (e). The action against the Sheriff for taking more than a certain sum on executions is always brought by the defendant in the execution: *King v. Marsack* (f); *Tyte v. Glode and another* (g).—[CRAMPTON, J. The words of the 2nd section of the statute of *Anne* are extremely large; the section says:—"In every execution, if there be any overcharge, the defendant is liable in an action for over damages."—That, however, would not exempt the plaintiff from liability for fees, and this shows that the remedy for the fees is independent of the remedy for damages. Under the statute of *Car.* there was a remedy for the damages; under the statute of *Anne* an additional boon is given.

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(a) 1 Salk. 331.

(b) 4 B. & C. 26.

(c) Cro. Eliz. 654.

(d) 5 Ir. Law Rep. 459.

(e) 2 T. R. 148.

(f) 6 T. R. 771.

(g) 7 T. R. 267.

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The generality of the words not having a co-extensive remedy for the grievances that may arise, has not the effect of imposing a liability on the defendant, because it does not give any privilege to the plaintiff.—[CRAMPTON, J. Where there is no damage done there can be no action under the statute.]—The defendant in the execution would not be damaged at all, for the fees are generally taken from the plaintiff in the execution; the statute of *Anne* applied to all executions—to *ca. sa* as well as *fi. fa.* If that be correct, the statute of 43 *G. 3*, c. 46, was unnecessary legislation. That statute was an imperial one, and must be an enacting one in both countries, or declaratory in both.

The statute 10 *W. 3*, c. 9, is important to be considered in this matter; it contained a special provision for the defendant paying the fees; but providing a remedy for him, to save him harmless in a particular case where he would be charged for more fees than he was liable to pay, cannot fasten on him a liability for lawful fees in every case; and so the statute of *Anne* merely gives a remedy for an additional grievance not otherwise provided for: *Rawstorne v. Wilkinson* (a); *Hayley v. Racket*. The implication of 43 *G. 3* is direct; that of the statute of *Anne* is but conjectural.

Supposing the defendant then liable, is he to be kept in custody by the Sheriff until he pay? In the case of a *fi. fa.* the Sheriff may receive the money; in that of a *ca sa.* he is but the officer of the Court, and is not to receive the money, but to have the defendant's body according to the exigency of the writ: after execution executed the Sheriff is to receive his fees; but what is the basis of the liability? not a remedy for damages, but for work done for the party. There is no provision in the statute to justify the defendant being kept in custody; the plaintiff is the person to receive the money, and the Court will not out of the statute of *Anne* raise a liability not before existing.

J. D. Fitzgerald, in reply.

We cannot contend that the plaintiff may not be liable for the fees.—[CRAMPTON, J. That then would give an option to the

(a) 4 Maul. & Sel. 256.

Sheriff to look to either plaintiff or defendant.]—We say that is settled by *Hill v. Buchanan* and *Bagot v. Malone*. Even before the statute of *Car.*, it may have been the practice to receive from the defendant the fees, for the import of that statute is, that Sheriffs took larger fees than they were entitled to. The statute of *Car.* declares that the fees therein enumerated may be received by the Sheriff, but the analogous English statute of *Eliz.* gave the Sheriff no right to take, demand or levy fees at all. The Irish Act uses the words “levy, take or receive,”—that must be on or from some person. *Woodgate v. Knatchbull* was not an action for damages, but an action by a party grieved, to recover the excess beyond the legal fees demandable; on the statute of *Car.*, it might be doubted if the defendant were not liable for fees; and in reference to the 43 *G. 3*, that very case of *Woodgate v. Knatchbull* furnishes a clue to the object for which it was passed. The statute of *Car.* imports that fees are to be taken from some one; but why should the plaintiff be liable to those fees when it is the defendant who is the cause of the Sheriff being put in motion, because of his not paying his debt? The statute of *Anne* is to lessen fees and prevent extortion; its first section renders it mandatory on the plaintiff the certifying what is due, and lodging that certificate with the officer; and its 2nd section equally evidences that it was passed for the defendant’s protection.—[MOORE, J. Do not the words “levy, demand and receive” in one part of the section, and “demand and receive” only in another, show a difference, and is that not in favour of the defendant?]*—Slackford v. Austin* (a). What does “levy” mean? Seizure of the goods or body. But the 2nd section does not specify from whom the fees are to be taken.—[MOORE, J. The action is only given if he take fees for a larger sum than named in the certificate.]—That but shows the Sheriff is entitled to fees from some one, and is liable in damages to the defendant in the execution. If the defendant be not damnified he cannot maintain the action; the statute gives him double damages, there must be therefore something extorted from the defendant which he is entitled to recover.—[CRAMPTON, J. The statute does not give the Sheriff any additional fees, nor does it take away any liability that before existed; but you are calling on

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(a) 14 East, 468.

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us to imply that the statute took away from the plaintiff a liability to pay fees, and that it made the defendant liable, on a section expressly giving the defendant a right of action.]—We must admit the plaintiff still continues liable.—[BLACKBURNE, C. J. If so, has he a remedy over against the defendant?—The execution is executed the moment a capture is made; but it is for the risk that Sheriffs' poundage is given. We say that under the statute of *Car.* both plaintiff and defendant are liable; there is no decision to the contrary; though there may be *dicta*. If the defendant be not liable he cannot be damnified, how then could it be said the statute is but declaratory?—[CRAMPTON, J. If more fees were taken than what defendant was liable for, that would not prevent the Sheriff recovering from the plaintiff, if he were liable, for demanding from the defendant would be but demanding more than the Sheriff was entitled to.]—The statutable offence is for demanding more fees than specified in the certificate of the plaintiff.—[MOORE, J. I think the words in the statute "fees for" came into it by mistake.]—*The King v. Fitzgerald (a)*.

Cur. ad. vult.

BLACKBURNE, C. J.

Nov. 21.

This was an action on a promissory note given by the defendant, who was defendant in a suit in which he was arrested under a *capias ad satisfaciendum*. The plaintiff was the Sheriff who arrested him, and the consideration for the note was the Sheriff's poundage.

The case originated in an application to this Court, which, seeing the difficulty and importance of the question involved, ordered the plaintiff to declare on the note, so that the liability of the defendant to the payment of this demand might be placed on the record, so as to admit of a revision by a Court of Error of our judgment. A special verdict has accordingly been found, and the case has been fully argued, and I come now to pronounce our judgment, and the reasons for it, though I shall not enter into any lengthened detail of them.

The poundage, which is a fee given to the Sheriff, on the exe-

(a) 1 Jones, 35.

cution, is both in England and Ireland the matter of statutable enactments. The question whether it should be paid by the plaintiff or defendant, if it was one of serious doubt, has long ceased to be so: it is clear beyond doubt that it is the plaintiff in the execution that is bound to pay it: *Hayley v. Rucket*. Independent of authority, the imperial statute 43 G. 3, c. 46, which enacts, that the Sheriff shall, in addition to the sum endorsed on the writ, levy the poundage off the goods of the defendant in the execution, is a recognition of his previous exemption; and this recognition in a statute which equally relates to both countries goes very far to establish the proposition that in the contemplation of the Legislature the law was in this respect the same. Our decision of both, if for the plaintiff, would contradict this, and as a consequence the Sheriff would recover this fee from the defendant, where in England he would only recover it from the plaintiff. This is certainly a consequence to be if possible avoided, when we consider the importance of having in both countries the same law on the same subject matter; and I therefore enter into the consideration of the construction of our statute, which gives rise to the difficulty, with a strong conviction that the words of the Irish statute which are said to occasion the difference ought clearly to express the liability of the defendant. But the necessity for this is still further apparent from this—that the construction of the Irish statute necessarily contended for by the plaintiff is one which would have the effect of altering the legal liability of the parties; for the plaintiff in the execution, being the person for whose benefit and at whose instance the Sheriff acts, is the party who, according to the authorities, is liable to remunerate him for his services; and in addition to this, we find that neither by the form of the writ of *capias ad satisfaciendum* as at Common Law, nor by any addition prescribed to be made to it by the statute of *Anne*, is the Sheriff authorised to receive any fee to perform any other duty than that of having the body at the return of this writ.

What then do we find in this statute to meet and satisfy a requisition so reasonable, so well justified by these various considerations? *an implication*, and nothing more than an implication, from the words, “that in case the Sheriff should demand more fees than

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"appear to be due by such certificate, he shall be liable to the
 "action or suit of the party against whom such execution issues."

I do not mean at all to detract from the force of the argument which these words appear to justify, but they amount at the utmost to an implication that the defendant would be unable to pay the fees certified. This is but slender ground, and by no means sufficient for varying a Common Law obligation, and shifting the liability from the plaintiff to the defendant. But whatever be its true construction, we have the authority of the decision in *Hill v. Buchanan*, that the plaintiff in the execution remained liable. The *dictum*, that the defendant was also liable, cannot, I think, be supported. There is, however, opposed to this the high authority of the Court of Exchequer in the case of *Cowper v. Gould*: it appears to have been fully considered, and has, as far as we can ascertain, been acquiesced in and acted on. With its authority we felt we could not interfere on motion, and it formed our principal reason for having the question put upon the record.

I do not mean to review the grounds of the decision in that case; but dissenting from that decision, I shall be ready to reconsider the whole subject if the plaintiff shall, as I hope he will, remove the case into the Court of Exchequer Chamber. We feel ourselves bound to give judgment in favour of the defendant; and in this my Brother PERRIN, who heard the argument, authorises me to say he concurs.

Judgment for defendant.

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CONWAY v. WILSON.

Nov. 8.

J. ROBINSON, on behalf of the defendant, applied to stay proceedings in this cause until security for costs was given.

The affidavit on which he relied stated that the summons in the action was served in September, and the declaration filed in that month; that the plaintiff was at present at sea, and that he had no residence or property in this country; and that when inquired after, according to the description in the writ of summons, at No. 1 Sir J. Rogerson's-quay, the answer was, he did not live there at all. The plaintiff was a sea-faring man, commanding a ship, and No. 1 Sir J. Rogerson's-quay was the office of the ship's agent. In *Henschen v. Garves* (a), a foreign seaman having brought an action for wages against a foreigner, the Court refused to compel him to give security for costs, on account of his being on a voyage on board an English ship. There the circumstances were peculiar, and Rooke, J., differed from the rest of the Court. *Wells v. Barton* (b), *Ford v. Boucher* (c), may be cited; but the rule in *Ford v. Boucher* was made on the ground of the affidavit being untrue.

A sea-faring man, occasionally resident in this country, will not be required to give security for costs in an action brought by him.

Purcell, contra.

The case of a sea-faring person is specially exempted from the rule requiring security for costs to be given: *Nelson v. Ogle* (d); and that decision has been since followed: *Anonymous* (e). We have made an affidavit, in which we state the plaintiff is a sea-faring man, trading between Dublin and New York, and that the place he is to be heard of is at No. 1 Sir J. Rogerson's-quay, and that his residence is at Kingstown, where his family at present are: *Corscaden v. Stewart* (f).

(a) 2 Hen. Bla. 384.

(c) 1 Hodg. 58.

(e) 8 Taunt. 737.

(b) 2 Dowl. P. Cas. 160.

(d) 2 Taunt. 253.

(f) 1 Ir. Law Rep. 110.

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Robinson replied.

Corscaden v. Stewart was decided on a ground quite inapplicable here, namely, that the party from whom the security was sought was the defendant in replevin; the plaintiff here has mis-stated his residence: 13 *Vic. c.* 18, s. 2.

BLACKBURNE, C. J.

We do not think the rule requiring security for costs to be given applies to a person occasionally resident in Ireland. In the plaintiff's affidavit it is stated he has a residence at Kingstown; that implies a domicile. We say no rule; but as the defendant may have been misled by the reference to Sir J. Rogerson's-quay, we say no costs.

JOHN PURCELL v. ANDREW NASH.

Nov. 18, 20.

Three denominations of land were demised by Sir J. P. by a lease of 1803, at a rent of £227, for three lives, to the defendant. After the execution of this lease a lease was executed by the defendant, of one of the denominations,

to a trustee for the lessor at a rent of £147, but the trustee executed no deed transferring the legal estate; the rents were paid by the sub-tenants to Sir J. P. the lessor, and the plaintiff allowed credit to the original lessee and his representatives for the rent reserved under the derivative lease. In an ejectment for non-payment of rent, brought by the heir-at-law of Sir J. P. against the representatives of the defendant, *Held*, that such was maintainable, as the plaintiff's possession was solely referrible to his trustee, he himself not having the legal estate in the lands.

EJECTMENT for non-payment of rent, tried before Howley (Sergeant) at the Summer Assizes of 1851, for the County of Cork. It appeared from the evidence given at the trial that, by a lease of the 10th of April 1803, Sir John Purcell demised to Andrew Nash the lands of Clostogue and Graigue for three lives, with covenant for perpetual renewal. By lease of the 15th of April 1803, Andrew Nash demised to John Glover the lands of Graigue for the same three lives, with covenant for perpetual renewal, and upon this lease there was an indorsement without date, signed by John

Glover, declaring a trust for Sir John Purcell. The rent reserved by the former lease was £225, that by the latter was £148; and it was proved that for a long period, the difference between the two rents, viz., £77, was paid by Andrew Nash, and such balance was the only rent mentioned in the receipts given by Sir John Purcell's agents.

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The action was brought by the plaintiff as heir-at-law of Sir John Purcell, and it appeared that no rent had been paid under the lease of the 10th of April for three years, and it was further proved that the plaintiff was in the actual occupation of part of the lands of Graigue, and in receipt of the rents of the residue.

The learned Judge left the following collateral issues to the jury:—

First—Whether the lands in the lease of the 15th of April 1803 form a portion of the lands comprised in the lease of the 10th of April 1803? and the Jury found they were a portion of the same lands.

Secondly—Whether the lease of the 15th of April 1803 was a lease in trust for Sir John Purcell? and they found that it was.

Thirdly—Whether, supposing that the lease was in trust for Sir John Purcell, did Glover the trustee, or his heir, assign to him or to the plaintiff? They found there was no assignment.

Fourthly—Whether the possession of the land by John Purcell the plaintiff was a possession under the trustee or in his own right? They found that John Purcell assumed a right to the land, without any reference to the trustee.

Fifthly—Whether there was any agreement between the parties that the rent reserved under the lease of the 15th of April was to be applied in part payment of same? Their finding was:—"It does not appear that there was any agreement, but it appears to have been the practice to set off one rent against the other for the last eleven years."

On these findings the learned Judge directed the jury to find for the defendant, reserving liberty to the plaintiff to move to have a verdict entered for him.

A rule *nisi* having been obtained by the plaintiff, in pursuance of the leave so reserved—

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J. D. Fitzgerald and Sir *C. O'Loghlen* (with them *J. O'Hagan*) showed cause.

At the time of bringing this action, Purcell was in possession of the lands of Graigue, either by himself or his undertenants, and being so in possession of part, and having made an abatement of rent, the ejectment being brought for the entire, we contend that the ejectment for non-payment of rent was not maintainable; *Delap v. Leonard* (a).

There cannot be a partial eviction of a lease; how then can the plaintiff recover possession of a thing the greater part of which he has already in his possession? *Winter's case* (b). *Rawlynn's case* (c): "Although the condition consisted of two parts in the disjunctive, either for non-payment of the rent, or of the sum in gross, which as to that was collateral; yet if it had been found that C had re-demised any part of the house to R, and that R had entered, by which the rent was suspended, that thereby the whole condition, as well as to the said collateral sums as to the said rent, was suspended." The absolute possession as of right of a portion of the demised premises prevents the plaintiff maintaining the ejectment to defeat his own possession. The finding of the jury was, that Purcell entered as of right without notice of any trust, and the whole circumstances of the case show a re-demise of the lands: *Hodgkins v. Robson* (d).—[CRAMPTON, J. But the jury have found there was no assignment by the trustee or his heir; if there had been an assignment it might have brought the case within *Hodgkins v. Robson*.]—The possession was by right, and was clothed with title; it was not in right of the trustee, and the presumption necessarily is that there was an assignment from the trustee. How then is ejectment maintainable? Every one in possession of the lands is to be served with the ejectment, and was the plaintiff himself to be served? The undertenants were in possession, paying rent, and the plaintiff was estopped ejecting them. He could not defeat their title, and if so he cannot maintain this ejectment.

(a) 5 Ir. Law Rep. 287.

(c) 4 Rep. 52, b.

(b) 3 Dyer, 308, b.

(d) Vent. 276.

Butt and *R. R. Warren*, contra.

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The Judge should have directed the jury that the possession of the landlord was as the agent or bailiff of Glover the trustee, and that the payment of the rent to Purcell was a payment to the trustee. No presumption can exist in favour of an assignment to the plaintiff: *Doe d. Graham v. Scott* (a). An old mortgage term of one thousand years created in 1727 was recognised in a marriage settlement of the owner of the inheritance in 1751, by which a sum was appropriated to its discharge, and no further notice was had of it until 1802, when a deed to which the then owner of the inheritance and the representatives of the termors were parties, reciting that the term was still subsisting, conveyed it to others to secure a mortgage, and it was held that it could not be presumed to have been surrendered, against the owner of the inheritance, who was interested in upholding it. On plain principles therefore the possession here must be considered that of the trustee; the lease is outstanding in Glover's representative, and there is nothing to prevent him bringing ejectment on the title, and turning Purcell and his undertenants out. The defendant Nash might maintain an action of covenant against Glover for the rent reserved by the sub-lease.—[MOORE, J. Whether Purcell's possession was in his own right, or not, was one of the questions left to the jury, and on the finding, that he assumed a right without any reference to the trustee, he could not be bailiff of the trustee.]—But the Judge should have directed them that Purcell's possession was that of the trustee, or at least he should have recommended such a finding. The legal estate created by the deed of 1803 is in Glover, still outstanding, and was created to protect the landlord's rights. That finding of the jury therefore is improper: *Doe d. Hills v. Morris* (b). There an ejectment was brought to recover possession of premises under a clause of re-entry for breach of covenant in a lease, and the lessor of the plaintiff was himself in possession of a part of the premises, and it was held to be unnecessary for him to demand possession of that part. We do not dispute *Delap v. Leonard*.

(a) 11 East, 478.

(b) 6 Jur. 326.

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Sir C. O'Loghlen replied, and cited *Freeman v. Barnes* (a), to show that the plaintiff was but tenant at will to the trustee, and could not maintain ejectment.

Cur. ad. vult.

BLACKBURN, C. J.

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In this case the plaintiff moved to set aside a verdict obtained by the defendant, and, pursuant to leave reserved, to have a verdict entered for him. We think he is entitled to have his conditional order for this purpose made absolute.

The action was an ejectment for non-payment of rent reserved on a lease executed in April 1803 by the plaintiff's father to Nash, of three denominations of land, at a rent of about £227, for a lease of three lives. A few days after its execution, a lease or assignment for the same lives was executed of one denomination by the lessee to a person named Glover, as a trustee for the lessor, at a rent of £147. The trustee did not execute any deed transferring any legal estate to his *cestui que trust*; the legal estate therefore remained in the trustee, and afterwards descended to his heir, who is now seised for the residue of the term, subject of course to the covenants contained in the second lease. As to the possession of this denomination, it is occupied by tenants, but under what tenure or from whom they hold does not distinctly appear; but they have paid their rents to Purcell, and the plaintiff, as his heir, who must have been permitted to receive them by the trustee. They, the lessor and the plaintiff, from time to time have allowed credit to the original lessee and his representative for the rent reserved under the second or derivative lease. It is therefore obviously subsisting in the heir of the lessee, and liable as any derivative whole or interest to be evicted for the non-payment of the rent reserved by the lease out of which it is derived.

The defendant however contends that by the receipt of rent the plaintiff is in possession of part of the demised premises, and that therefore, both with reference to the effect of conditions at Common Law and the Ejectment Statutes, he cannot maintain this ejectment. But I apprehend that, in order to give his possession any such effect, it must either amount to a tortious eviction (which it clearly is not),

(a) 1 Siderf. 458.

or, as was decided in this Court in *Delap v. Leonard*, be a possession by a re-demise or a re-grant. Here there is no re-demise or re-grant under which the plaintiff has any title—nothing but the bare receipt of rents, which can be referred to no other right or title than the mere permission of the trustee. This, as it gives the plaintiff no right to the possession capable of being legally asserted, cannot, in my opinion, operate as a bar to the exercise of his otherwise indisputable right to bring this ejectment. Indeed if we came to a contrary decision, we should in effect pronounce it to be impossible for a landlord by any legal means or device to occupy the smallest portion of the demised premises without abandoning his right to re-enter in ejectment for non-payment of his rent. Rule absolute.

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ALLEN v. LLOYD.*

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CASE, against the Sheriff of the county of Limerick, for a false return.

The declaration was in the common form.

Plea—Not guilty.

The case was tried at the Sittings after last Trinity Term, before BLACKBURNE, C. J.

It appeared from the evidence that a writ of *fi. fa.* having issued, directed to the Sheriff, was duly delivered to him, and he having seized all the goods and chattels of the defendant in the execution, including certain growing crops on his lands in the county of Limerick, the landlord came forward and claimed a year's rent. The Sheriff served a notice on the plaintiff (the execution creditor) requiring him to pay the year's rent to the landlord, which the plaintiff refused to do, and the Sheriff thereupon withdrew the seizure, and made a return of *nulla bona*.

A Sheriff, under a writ of *fieri facias* having seized growing crops, the plaintiff in the execution declined to pay the landlord a year's rent claimed out of the premises, and thereupon the Sheriff abandoned the seizure and returned *nulla bona*. Held, that growing crops are "goods and chattels" within the meaning of the 9 Anne, c. 8, and that the Sheriff was justified in not selling unless the

execution creditor satisfied the landlord for the rent.

* PERRIN, J., *absente*.

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Counsel for the plaintiff contended, that inasmuch as growing crops were no longer distrainable for rent since the passing of 9 & 10 *Vic.* c. 111, the landlord's lien thereon for a year's rent no longer existed.

Counsel for the defendant called for a nonsuit, or a direction for the defendant, which the learned Judge refused; and told the jury to confine their verdict to the value of the growing crops, and to find for the plaintiff to that extent; and he reserved liberty to the defendant to move to have a nonsuit, or a verdict entered for him, in case the Court should be of opinion that notwithstanding that statute 9 & 10 *Vic.* c. 111, a landlord is still entitled to a year's rent where the effects seized consist of growing crops of the tenant. A verdict was accordingly found for the plaintiff.

An order *nisi* having been obtained, in pursuance of the leave reserved—

Martley (with him *Leslie*) showed cause.

The question here is, whether the Sheriff having under a writ of *fi. fa.* seized, amongst other chattels, growing crops, the landlord was entitled to be paid a year's rent out of those growing crops? At Common Law the execution creditor could seize growing crops, but the landlord could not; and so far as the creditor was concerned, the landlord had no right to interfere with the execution. The 9 *Anne*, c. 8 was passed to remedy that inconvenience, and the 1st section provides, that no goods or chattels whatsoever lying or being in or upon any messuage, &c., shall be liable to be taken in execution, unless the party at whose suit the execution issued, before the removal of the goods off said premises, pay the landlord one year's rent, and on payment thereof the party may proceed with his execution. The words "no goods," &c., must be applied to the subsequent words of the section, which prohibit the Sheriff not from seizing but from removing these growing crops. The 56 *G.* 3, c. 88, gave the landlord the power to distrain and seize the growing crops, and save and sell them. The 9 & 10 *Vic.* c. 111, s. 13, repeals the 56 *G.* 3, as to the landlord's right to distrain, so that the landlord is remitted to his rights under the statute of *Anne*. The right given to the landlord

by that statute to intervene when the goods were *in custodia legis* gave him the right of making a claim in lieu of a distress; the Sheriff was not warranted in refusing to seize, he was only to abstain from removing what he had seized. A term of years is a chattel interest, and an execution creditor could seize that interest, yet the landlord could not intervene in such a case and distrain; and if he could not, why should he be entitled to demand a year's rent in respect of the them as against the execution creditor?—[CRAMPTON, J. In the case of a term of years there is no actual removal.]—*Wharton v. Naylor* (a) was decided on the analogous English statute 8 *Anne*, c. 14, which makes it unlawful to remove goods taken in execution without paying one year's arrears of rent to the landlord; but it does not invalidate the execution itself; and it was held that goods so taken are *in custodia legis* and cannot be distrained on by the landlord for the year's rent; and this too, whether they are in the hands of the Sheriff or his vendee.

Under 11 *G.* 2, c. 9, *Eng.* (corresponding with 56 *G.* 3, *Ir.*), enabling a landlord to seize growing crops, it has been held, that crops taken in execution are not distrainable by the landlord for rent become due after the taking in execution: *Peacock v. Purvis* (b). It is clear, therefore, that these goods, being in the custody of the law, are protected from the landlord's claim. Even the equitable jurisdiction of the Court over the Sheriff would not be used to compel him to pay the amount until the crops were severed. If the vendee buy from the Sheriff for a price to be paid immediately, the landlord has a right to be paid, but on goods *in custodia legis*, the landlord's right of distress is taken away. Even if the execution creditor refused to pay the landlord, the Sheriff had no right to say he would not seize; the landlord had only a right to complain of the removal of the goods.—[MOORE, J. At Common Law the landlord could not distrain goods in the custody of the law, but the statute gives him a sort of statutable distress for one year's rent; the question therefore is, whether his remedy under the statute be not co-extensive with his original right of distress?—The 14 & 15 *Vic.* c. 25, s. 2, provides that "In case all or any part of the growing

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(a) 12 Q. B. 673.

(b) 2 Br. & B. 362.

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“crops of the tenant of any farm or lands shall be seized and sold by
 “any Sheriff or other officer, by virtue of any writ of *fiери facias* or
 “other writ of execution, such crops, so long as the same shall remain
 “on the farm or lands, shall, in default of sufficient distress of the
 “goods and chattels of the tenant, be liable to the rent which may
 “accrue and become due to the landlord after any such seizure and
 “sale, and to the remedy by distress for recovery of such rent; and
 “that notwithstanding any bargain or sale or assignment which may
 “have been made or executed of such growing crops by any such
 “Sheriff or other officer.” Here this rent was due before the seizure.
 But it may be said that the Legislature did not think it necessary to
 provide for rent due before the seizure, as it was already provided
 for: the authorities show that the Sheriff is bound to seize, and that
 his liability to the landlord does not arise until the removal of the
 goods; he therefore was not justified in making a return of *nulla*
bona; he should have seized and sold, subject to the landlord's claim.
Risely v. Ryle (a) was a case where the Sheriff seized goods under a
fiери facias; and after notice that the rent was due to the landlord,
 he removed the goods without the rent being paid, and it was held
 the Sheriff was liable in an action for such removal, at suit of
 the landlord.—[MOORE, J. The Legislature, in passing 14 & 15 Vic.
 c. 25, must have considered the law in this respect the same in both
 countries.]

Fitzgibbon and *R. Ferguson*, contra.

When a Sheriff seizes under an execution, and sells the goods,
 they are in the hands of the vendee as if *in custodia legis*, and the
 right of the landlord is gone. A term of years is clearly not within
 the operation of the statute; then growing crops are goods and
 chattels lying, and being on the land, otherwise the Sheriff would
 have no right to seize them. The object of the statute of *Anne* was
 to protect the landlord from the effect of this legal principle, other-
 wise it would be only necessary to lay on a friendly execution, and
 thus defeat the landlord's right. *Calvert v. Joliffe* (b), *Buckley v.*
Woodmason (c), *Needham v. Kelly* (d), show that the Sheriff was

(a) 11 M. & W. 16.

(b) 2 B. & Ad. 418.

(c) 1 H. & Br. 100.

(d) 3 Ir. Law Rep. 181.

bound to return *nulla bona*. It is a mistake to say that the removal only renders the Sheriff liable, for the moment he seizes and sells, the landlord's right is gone. The 14 & 15 *Vic.*, being *in pari materia* with the statute of *Anne*, but provides a remedy that the statute of *Anne* did not provide for, and it is a fair implication that the Legislature supposed that the statute of *Anne* provided for cases where rent was due at the time of seizure. The case of growing crops comes as much within the mischief of the statute of *Anne* as that of moveable goods and chattels. *Wright v. Dewes* (a) decides that growing corn sold under a *fi. fa.* is not distrainable for rent accruing due after the seizure in execution; so that crops seized under an execution, if left on the premises, are in *custodiâ legis*. *Duck v. Braddyll* (b) shows that the Sheriff is answerable to the landlord for taking goods, when, as the Court say, "he has by his acts disappointed the landlord of his rent;" and that is exactly the case provided for by this statute, 8 *Anne*, c. 14 (*Eng.*). Is the remedy provided by the 9 *Anne* altered or taken away by 9 & 10 *Vic.* c. 111? It only repealed 56 *G.* 3, c. 88, so far as allowing a landlord to distrain growing crops; it did not touch the law enacted by the statute of *Anne*, and it is now the same as then, unless 14 & 15 *Vic.* c. 25 have altered or modified it. The words of the writ of *fi. fa.* are "of the goods and chattels;" and "growing crops" are, by 56 *G.* 3, c. 88, corresponding with 11 *G.* 2, c. 9, (*Eng.*), considered "goods and chattels;" for it says landlords shall be at liberty to seize them as well as *other* goods and chattels. Fixtures and crops were not distrainable at Common Law: *Wyston's case*, *Year-book*, 14 *Hen.* 8, fol. 25; *Niblet v. Smith* (c); *Gorton v. Falkner* (d). Then 7 *W.* 3, c. 22 came, and rendered corn in sheaves, or cocks, or corn loose upon the ground, liable to be distrained: and 56 *G.* 3, c. 88, enabled the landlord to distrain all sorts of corn and grass which shall be growing on any part of the lands, and sell them when cut. The statute of *Anne* still is law; and in *Bennet's case* (e) it was said that the analogous statute in

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(a) 1 *Ad. & Ell.* 641; *S. C.* 3 *N. & Man.* 790.

(b) 1 *M'Cl.* 237.

(c) 4 *T. R.* 504.

(d) *Ibid.*, 565.

(e) 2 *Stra.* 787.

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England (8 *Anne*, c. 14,) only extended to the immediate landlord, and that the ground landlord could not come in for rent on execution against an under-lessee.

Leslie replied.

Cur. ad. vult.

BLACKBURNE, C. J.

Nov. 25.

This is an action for a false return to a writ of *fiери facias*. The return was *nulla bona* ; there was a verdict for the plaintiff, and the defendant has moved, pursuant to leave reserved, to have that verdict set aside, and a verdict entered for him.

The facts on which the question in the case arises are shortly, that the defendant, under a writ of *fiери facias*, seized a growing crop of corn, and the plaintiff in the execution having declined to pay the landlord a year's rent claimed out of the premises, the defendant declined to sell the growing crops, gave them up and returned *nulla bona*.

We have now to consider and decide whether this act of the Sheriff was legal, which depends on the answer to the question, whether growing crops are to be deemed goods and chattels within the meaning of those words in the 9 *Anne*, c. 8, s. 1 ? The plaintiff contends that they are not, because they were not liable to be distrained for rent ; the defendant insists that they are, and that the plaintiff in the execution not having paid the rent claimed, the Sheriff was not bound to sell them.

This section of the statute was as to landlords highly remedial ; the matter to be redressed was the injury resulting from the protection which the law afforded to goods taken in execution : they were in its custody, and not only exempted from the landlord's right to distrain, but, as has been settled by various authorities, the exemption existed in the case of growing crops, not merely while in the hands of the Sheriff, but when sold by him, for the time necessary to mature, save and carry them away. It was the plain object of the statute, in favour of landlords, to qualify the right which this exemption conferred on the creditor.

The mode and extent to which this has been done are next

to be considered. The statute enacts that no goods or chattels whatsoever, lying or being in any messuage or lands which shall be leased, shall be liable to be taken in execution, unless the plaintiff, before the removal of the goods from the premises, pays the landlord all rent due at the time of the taking of the goods, not exceeding one year, and the Sheriff is empowered and required to levy and pay the plaintiff the monies so paid for rent. It is observable that this section is conversant of all goods and chattels lying or being on the demised lands, liable to be taken in execution. But they form the subject matter of the enactment. There is no limitation of the Common Law right to seize them all, nor of the Sheriff's duty to sell all he has seized; the remedy intended for the landlord does not consist in any specific claim or right to any part of the goods, but in a condition imposed on the plaintiff—a *condition* not extending to any parcel of the property seized, but a condition which entirely suspends the power of the Sheriff to proceed in executing the writ by selling any part of the property seized, until it has been performed by the payment of the landlord's rent: when the condition is performed, the object of the statute is achieved, the creditor is restored to the full benefit of his execution, and the Sheriff is bound to sell all he has seized, levying in addition to the debt the sum the plaintiff has paid the landlord. In considering whether it be worth his while to accept or comply with the terms which the statute imposes, the plaintiff will have to decide whether to abandon the whole or retain the whole. If various articles are seized there, is no pretence for saying that the Act admits of the construction of a partial abandonment. The plaintiff could not say I will give up the moveable chattels, that the landlord might distrain, and sell the growing crops which he could not distrain. On the contrary, it is plain that he must purchase the right to have the whole sold, or totally abandon the execution.

These observations are the result of giving to the words of the statute their plain literal meaning. It is only on very cogent and satisfactory reasons that a Court can ever be justified in adopting any other mode or test of construction. The reason which has been suggested in the present case, namely, that growing crops were not

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within the meaning of the statute, because they could not be distrained, and that therefore they were not matters for which compensation was due, is utterly insufficient (even if it had reason to sustain it) to justify us in reading this section as if the words "growing crops" were expressly excepted from it. But in fact the necessity of relieving the landlord is just as strong in the case of growing crops as that of other property, because, as we have seen, the sale by the Sheriff operates in favour of the vendee to defeat the right to distrain, as effectually as if they were severed at the time of execution. For these reasons, I think the defendant is entitled to have the order he has moved for.

CRAMPTON, J.

I concur in the judgment of my LORD CHIEF JUSTICE, and in the reasons on which that judgment is founded. I wish, however, to add that the 14 & 15 Vic. c. 25, s. 2, appears to me to have an important bearing in support of the view stated by his Lordship. That enactment is to this effect:—"That in case all or any part of "the growing crops of the tenant of any farm or lands shall be "seized and sold by any Sheriff or other officer by virtue of any "writ of *fiери facias* or other writ of execution, such crops, so long "as the same shall remain on the farms or lands, shall, in default of "sufficient distress of the goods and chattels of the tenant, be liable "to the rent which may accrue and become due to the landlord *after* "any such seizure and sale, and to the remedies by distress for recovery of such rent; and that, notwithstanding any bargain and "sale or assignment which may have been made or executed of "such growing crops by any such Sheriff or other officer." This enactment is applicable to Ireland equally as it is to England. It is entitled, "An Act to improve the Law of Landlord and Tenant "in relation to emblements, *to growing crops seized in execution*, "and to agricultural tenants' fixtures." The state of the law in the two countries as to growing crops is somewhat different. By the 11 G. 2, c. 19 (*Eng.*), the landlord was given the power of distraining growing crops, a power which he had not by the Common Law; and by the 56 G. 3, c. 88, that law was extended to Ireland.

In England the law in that respect remains unchanged ; but that is not so in Ireland ; for the 9 & 10 *Vic.* c. 111, s. 13, repeals the 56 *G.* 3, c. 88, and takes from Irish landlords the right to distrain growing crops.

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Now I think we must assume that the Legislature, in enacting the imperial statute of the 14 & 15 *Vic.* c. 25, s. 2, must have known what the state of the law in both countries was, and that in Ireland there did not then exist the right to distrain growing crops for rent, though such a right did exist in England. The difference was this in effect :—the law of England enabled the landlord to distrain his tenant's crops for an arrear of rent, while the crops remained uncut ; in Ireland the right to distrain was suspended or postponed until the crops were severed ; but the crops while so uncut still remained (in a certain sense) a pledge to the landlord for his rent ; the moment they were severed, whether in the hands of the tenant or his vendee, the landlord's right to distrain at once accrued. If, then, an execution creditor, who by the Common Law had the right under a *fiery facias* to seize and sell his debtor's growing crops, made such a seizure, the crops so seized, whether in the hands of the Sheriff or in those of his vendee, became and remained in the custody of the law until cut and severed by the vendee, and until a reasonable time for their removal had elapsed. The principle of "*custodia legis*" thus in England took away the landlord's right to distrain the growing crops of his tenant, in the hands of the Sheriff or his vendee *from the moment of seizure* ; in Ireland it operated to deprive the landlord of his right to distrain the severed crops *from the moment of severance* only, when that right accrued ; until a reasonable time for its removal by the vendee had elapsed. In England the creditor's right to remove the severed crops, as well as any other goods which had been seized, was modified by the statute which made his payment of the arrear of rent due to the landlord, not however exceeding a year's rent, a condition precedent to his right to remove the goods. Our statute of *Anne* in similar terms imposes a similar condition on the execution creditor before he shall be entitled to remove whatever goods and chattels may have been seized under the *fiery facias*.

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But it is suggested that the landlord's right to the year's rent under the statute of *Anne* must be understood to be co-extensive only with the subject matter which was distrainable by him when the execution was laid on; and that in Ireland therefore the right to the year's rent does not arise when the subject of seizure is a growing crop. But I think the more accurate and reasonable view of the subject is, that his right to the year's rent is co-extensive *not* with that which was liable to his distress *at the time of the execution laid on*, but with that which was liable to his distress at any time before its removal by the vendee.

Now the enactment of the 14 & 15 *Vic.*, to which I have referred, appears to me to be founded on this view of the subject:— It manifestly assumes, in the case of a seizure and sale of growing crops under a *fieri facias* (in Ireland as well as in England), that the year's rent provided for by the statute of *Anne* is already secured, and it proceeds to provide for the new gale of rent accruing due since the execution laid on, and before the removal of the crops. I must give credit to the Legislature for knowing the law it was about to change or modify, and I cannot impute to it the absurdity of allowing to the Irish landlord the power of compelling payment of the gale which accrued due to the landlord after the seizure, and leaving the arrear due before the seizure unprovided for, contrary to the course in England. The Act of 14 & 15 *Vic.* was intended for the benefit of the landlord, whether English or Irish. It provides a common remedy for what appeared to be a common mischief, and it plainly intimates that the English and the Irish landlord stood upon a common footing in relation to their rights as against an execution creditor, under whose execution their tenant's growing crops had been seized and sold. Put the case of a seizure and sale both of growing crops and of furniture, or other moveable goods, and suppose the produce of the sale of the furniture to be inadequate to pay the year's rent. What is the Sheriff to do? Is the landlord to have only the produce of the sale of the furniture? That leaves the year's rent unpaid, and therefore, under the statute, there can be no removal of the goods seized. Is he to have nothing from the produce of the sales? That would be equally against the statute.

It remains, therefore, that in the case I have put, the landlord, even in Ireland, is entitled to the whole year's rent before the removal of the growing crops as well as of the furniture. It can make no difference that only growing crops were seized.

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MOORE, J.

I concur in the judgment of my LORD CHIEF JUSTICE, and my Brother CRAMPTON, and the reasons they have assigned.

Independent of that statute to which my Brother CRAMPTON has adverted, I have, after much fluctuation of opinion, come to the conclusion, that this case comes within the operation of the statute of 9 *Anne*, c. 8. The question is one of the utmost importance; it depends on the construction of a statute more generally in operation and use than almost any other on the statute book, and involving the rights of two classes of the community; it involves the right of every landlord, on whose land there should be a growing crop, and of all creditors who might seize such crops under an execution.

The object of the statute of *Anne*, as expressed in its preamble, was for the more easy and effectual recovery of rent. To accomplish this object, the statute does not profess to extend the right of a landlord, by giving him power to distrain any thing which before the Act he could not by law distrain; but the statute appears to me to operate by a restriction of the rights of the execution creditor to the extent of a year's rent, by depriving him of the protection of a legal principle, which but for the statute he would be entitled to. It has been held under that statute that the liability of a Sheriff to a landlord only arises where there has been an actual removal of the goods taken under the execution; and in the case of *Smallman v. Pollard (a)*, it was held that a bill of sale by the Sheriff did not constitute a constructive removal so as to render him liable; and it therefore appears to me that the removal of the goods by the Sheriff or his vendee is the period to be looked to for the ascertainment of the rights of the conflicting parties. It is plain that, with some few exceptions, all goods and

(a) 8 Jur. 246.

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chattels to be found on the demised premises, and in a state capable of immediate removal, are liable to be distrained for rent. Growing crops were not in that state distrainable for rent at Common Law, nor are they now in this country; but when severed, they were clearly subject to the distress, so long as they remained on the demised premises. In like manner, fixtures attached to the soil were not distrainable, but if severed from the soil they then became distrainable on the demised premises, like any other goods and chattels. Growing crops and fixtures, though not in that state liable to a distress, were at all times capable of being seized under an execution, and if so seized, they were when severed from the soil protected from a distress, by the principle of their being *in custodia legis*.

I think the operation of the statute of *Anne* was to deprive the execution creditor of his protection under that principle, to the extent of a year's rent, if due at the time of seizure; and accordingly the prohibitory words of the statute are co-extensive with the power of the Sheriff under the execution, and extend to all *goods and chattels whatsoever*, which could be taken by him under it. There is nothing in the Act to limit or qualify the generality of the words used, or to justify the Court in saying that the statute is to extend to some goods and not to others. I think the true construction of the statute is, to prohibit the removal of *any* goods and chattels taken under an execution, unless a year's rent, if due at the time of seizure, be paid. By this construction, the object of the statute is accomplished, and full effect given to the words used, without any restriction or qualification. I think this construction is strongly supported by the 2nd section of 14 & 15 *Vic.*, c. 25, to which my Brother CRAMPTON has referred, and which extends to Ireland. It had been held in the case of *Hoskins v. Knight (a)*, and in other cases, that under the statute of *Anne*, the landlord had no rights as to rent which accrued due after the seizure in execution; but the statute of *Vic.* gives the landlord, in certain cases, a power to distrain growing crops previously taken under an execution for rent which accrued due after the seizure; the Legislature plainly con-

(a) 1 M. & Sel. 245.

sidering that under the statute of *Anne* the landlord was sufficiently protected as to the rent which had accrued before the seizure, and giving him a further protection as to rent which had accrued due after. It appears to me therefore that the statute of *Vic.* may be considered as a legislative declaration of what was the law under the statute of *Anne*, and thus fortifies the construction which I have given to that statute.

For these reasons, in addition to those assigned by the other Members of the Court, my opinion is that judgment should be entered for the defendant.

Judgment for defendant.

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Executors COLLINS v. O'MULLANE.

Nov. 3.

E. SULLIVAN, on behalf of the plaintiff, moved that the demurrer taken to the plaintiffs' declaration be set aside for irregularity.

The declaration was in the common form in assumpsit, for goods sold and delivered by the testator to the defendant, and stated the day on which the causes of action accrued without a videlicet, and concluded with profert of the letters testamentary. The defendant cravedoyer of the letters testamentary, and only set out the certificate of the ordinary, and then specially demurred to the declaration on the ground of repugnancy, as it appeared that the day on which the letters testamentary were granted was prior to the date on which the promises were stated in the declaration to have been made to the testator.

A defendant cravedoyer of letters testamentary, and omitted to set out the will, only stating the certificate of the ordinary. *Held*, that such proceedings were irregular, and would be set aside on motion.

Sullivan, for the motion.

The letters testamentary are imperfectly set out; the will should have been set out *in hæc verba* on the demand ofoyer, as it constitutes part of the letters testamentary: this is sufficient ground for

M. T. 1851. setting aside the demurrer: *Wallace v. The Duchess of Cumber-*
Queen's Bench land (a). It was there held, if a defendant, after craving oyer of
 COLLINS a deed, do not set forth the whole deed, the plaintiff may sign judg-
 v. ment. as for want of a plea, or the Court will set aside the plea :
 O'MULLANE. 6 *Bac. Ab. Pleas*, p. 330 ; *Cole v. Hulme* (b).—[BLACKBURN, C. J.
 The case of a deed may be distinguishable from that of a will. The
 liability in such a case may depend on the construction of the deed ;
 here it depends on the granting of the letters testamentary.]—A
 similar rule was adopted in the case of a will, in *Daly v. Ma-*
hon (c), where, as in this case, the certificate of the ordinary alone
 was set forth, and the plaintiff was allowed to mark judgment for
 want of a plea : 1 *Saund.* 291, H ; *Shepherd v. Shorthose* (d).

B. Stephens and Richards, contra.

The case of *Daly v. Mahon* merely establishes that the pleader has the option of including both the will and the letters testamentary on a demand of oyer ; but where there are two separate documents, and but one necessary to establish the case, it is sufficient for the pleader to set out that one only. In the case of a bond and condition it is not necessary to set out both : *Newton v. Wilmot* (e).

Per Curiam.

Set aside the demurrer, with costs, the defendant to plead issuably.

(a) 4 T. R. 370.

(b) 3 M. & Ry. 86, note.

(c) 5 Scott, 606.

(d) 1 Stra. 412.

(e) 8 M. & W. 711.

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BIRCH v. SIR WILLIAM SOMERVILLE.

Nov. 3.

J. PERRIN, on behalf of the defendant, moved that the plaintiff do furnish a further bill of particulars of his demand in this cause. The action had been brought by the plaintiff, the proprietor of a newspaper, against the defendant. The declaration contained a count for goods sold and delivered, and on an account stated, and the following bill of particulars of the plaintiff's demand had been furnished :—

The copy of an affidavit on which a motion is grounded must pursue the form directed by the 210th General Order, otherwise the motion cannot be sustained.

The filing of an affidavit in reply to such affidavit does not preclude the party taking advantage of the informality.

A bill of particulars ought to be something more than a mere echo of the declaration, and should state specifically the dates and items of the demand.

“ To balance remaining due for the work, labour, and services rendered by plaintiff to and for the defendant, and also for work, labour, and services rendered by plaintiff, in support of the existing administration, at the instance and request of the defendant, from the 16th of July 1848, to the 16th of January 1851									
									£6,700
“ To weekly numbers of the <i>World</i> newspaper supplied to said defendant, and distributed at his like request									
									300
									<hr/>
									£7,000”

The defendant had made an affidavit in support of the motion, in which he stated that the plaintiff had instituted an action in the Court of Queen's Bench in England, for a similar demand, and served a similar bill of particulars, which being considered insufficient and vague, an order was made, as deponent was informed and believed, that the proceedings in that cause should be stayed until a further bill of particulars was delivered, with the dates and items of the demand ; that no amended particulars had been furnished, and that no further proceedings had been taken in that action ; that deponent and those acting for him could not know the particulars of the work and labour alleged to have been done, and of the services rendered to the defendant, unless furnished with an amended bill of particulars, stating same in detail ; and that he was not aware of his being in any way indebted to the plaintiff for any sum of money, or on any account whatever ; and that he was advised, and believed, that it was material and necessary to have the items in detail of the alleged account. The plaintiff had filed an

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affidavit in reply to this, stating that the action was commenced for money due to him for writing and inserting in the *World* newspaper articles at the request of the defendant; and that he believed that the defendant was perfectly well acquainted with the particulars of this action, and had means of knowing thereof, by reference to copies of his own letters transmitted to deponent, the originals of which were in deponent's custody; that defendant had made payments from time to time on account of these services so rendered by the plaintiff, by personal cheques drawn upon the banks of Messrs. La Touche of Dublin, and Drummond of London; that during the years covered by the bill of particulars, deponent's services were rendered weekly, and sometimes daily, to the defendant; and that he had sat up at nights engaged in literary composition, at the request and with the knowledge of the defendant. In the copy of the defendant's affidavit, served on the plaintiff's attorney, the jurat was omitted, and nothing at the end of it but the words "sworn, &c."

Whiteside, contra, objected to the affidavit on which the motion was grounded, as being informal, and not in compliance with the 13 *Vic. c. 18*, s. 44, directing a true copy of every affidavit to be served on the opposite party, and 210th General Order, directing that all Commissioners for taking Affidavits shall certify in the jurat of every affidavit taken by them, either that they know the deponent himself or some person named in the jurat, who certifies his knowledge of him the deponent; that was omitted in this affidavit, nor is it shown distinctly when it was sworn: *In re Lloyd (a)*. The 84th General Order renders an affidavit necessary on a motion such as the present. The plaintiff, having filed an affidavit in reply to that made by the defendant, does not thereby waive the objection to this irregularity: *Clothier v. Ess (b)*; *Barham v. Lee (c)*.

CRAMPTON, J.

The plaintiff clearly has a right to object to the form of the affidavit.

(a) 15 Q. B. 682.

(b) 3 M. & Scott, 216.

(c) 4 M. & Scott, 327.

Per Curiam.

The Act of Parliament has not been complied with, the affidavit not being in the form thereby directed. Let the motion be refused, without costs, and let the time for pleading be extended, without prejudice to the plaintiff making a further application.

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Perrin renewed the application, on a similar affidavit, containing a proper form of jurat: *Ferguson's Forms*, p. 608. *Duffy v. Armstrong* (a). In an action like the present, the particulars should be as specific as possible; *Prichard v. Nelson* (b).

Nov. 8.

Whiteside and *Macdonogh*, contra.

This application is against the practice of the Court, it being nothing but the re-agitating a matter previously decided by the Court. The defendant abstains from answering a single statement in our affidavit, and we swear sufficient knowledge is given to him by our bill of particulars; we state the services were rendered by publications in the *World* newspaper, and by attendances on the defendant and his secretary. In an action by the builder of a house or carriage, it is not necessary to set out each item of the particulars. That case, *Prichard v. Nelson*, was an action brought against a stranger whom it was endeavoured to make liable by construction; that is not the present case; here is no endeavour to make Sir W. Somerville liable by construction. By rule of the Court, no bill of particulars is to exceed three folios; and is the plaintiff to set out all the articles in the *World*? *The King v. Orde* (c); *Todd v. Jeffery* (d); *Hurcum v. Steriker* (e). As to the affidavit of the defendant, it is a mistake to say it is like the precedent in *Ferg. Forms*. *Prichard v. Nelson* (f); *Anonymous* (g); *Higgins v. Ede* (h); *Younge v. Fisher* (i).

Perrin replied.

(a) Glasc. 315.

(c) 8 Ad. & El. 420, n.

(e) 2 Dowl. N. S. 524.

(g) 2 Law Rec. O. S. 489.

(b) 16 M. & W. 772.

(d) 7 Ad. & El. 519.

(f) 4 Dowl. & Low. 693.

(h) 3 Dowl. & Low. 471.

(i) 7 Jur. 69.

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BLACKBURN, C. J.

When this case was previously before the Court, it appeared that the defendant, being bound to sustain his application by affidavit, had not, pursuant to 13 Vic. c. 18, s. 44, served a true copy of the affidavit with his notice of motion, the jurat of the affidavit being omitted, and therefore the Court felt it could not enter into the merits of the motion. We, however, made an order on that motion with a view of enabling the defendant to renew his application, and have it determined according to its merits and justice. A second bill of particulars has been furnished since that order, but the Court consider both bills of particulars served to be illusory, and therefore that the motion must be granted, with costs.

W. H. C. MARRATT and JOHN O'CONNOR

v.

WALTER WALSH.

Nov. 17.

A bond, executed to A B and C D in their individual names as paid officers duly appointed for the purpose of carrying into execution the provisions of the Poor-law Act, comes within the exception of the 96th section of that Act, 1 & 2 Vic. c. 56, and is not liable to stamp duty.

Semble.— That on a writ of inquiry in pursuance of a suggestion of breaches, the bond on which the judgment is entered may be objected to for want of a stamp.

THIS case had been before the Court in Easter Term 1851, under the title of "*The Guardians of the Poor of the Waterford Union v. Walter Walsh*," on a demurrer taken to a declaration in an action of debt on a bond conditioned to account as poor-rate collector, and executed by the defendant Walsh to the present plaintiffs Marratt and O'Connor, therein described as paid officers, duly appointed for the purpose of carrying into execution within the Waterford Union the provisions of the Poor-law Act. The guardians having declared on this bond in their corporate name, the Court decided they were not entitled to sue in that capacity, as the bond was made to persons described to be paid officers duly appointed, and the money was to be paid to them or their attorney, successors or assigns (a). The guardians of the union thereupon by virtue of a

suggestion of breaches, the bond on which the judgment is entered may be objected to for want of a stamp.

(a) 1 Com. Law Rep. 370.

warrant of attorney, executed contemporaneously with the bond, entered judgment and suggested breaches, and a writ of inquiry was sped before MOORE, J., at the Summer Assizes of the county of Waterford. The bond, being offered in evidence with the condition annexed, was objected to by the defendant's Counsel, on the ground of its not being stamped; but the plaintiffs' Counsel contended that it was exempt from stamp duty by virtue of the 1 & 2 Vic. c. 56, s. 96 (Poor-law Act), and that even if it were liable to a stamp duty, such objection could not be made after judgment being entered on the bond. The learned Judge ruled with the plaintiffs' Counsel, and the jury found for the plaintiffs.

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A conditional order having been obtained to set aside this verdict, and that a nonsuit or verdict should be entered for the defendant, on the ground of the admission of illegal evidence, pursuant to leave reserved—

Lynch and *Harris* showed cause.

The objection that this bond is inadmissible for want of a stamp cannot be sustained after judgment was entered on it: the only purpose for which it was produced at the inquiry was to show that it was the identical bond executed by the defendant. *Kearney v. Power* (a) may be relied on by the other side; but that case was not well considered; no reasons are assigned for the judgment.

But assuming that the objection was admissible, this instrument was exempt from a stamp. The 1 & 2 Vic. c. 56, s. 96, enacts “that
 “no advertisement inserted by or under the direction of the Com-
 “missioners in the *London* or *Dublin Gazette*, or any newspaper, for
 “the purpose of carrying into effect any provisions of this Act, nor
 “any charge, mortgage, bond or instrument given by way of security,
 “in pursuance of the orders of the Commissioners, and conformable
 “thereto, nor any transfer thereof, nor any contract or agreement
 “made or entered into in pursuance of such orders, and conformable
 “thereto, nor any conveyance, demise or assignment respectively, to
 “or by the Commissioners, nor any receipt for rate, nor any other
 “instrument made in pursuance of this Act, nor the appointment of

(a) 7 Ir. Law Rep. 465.

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“any paid officer engaged in the administration of the laws for the relief of the poor, or in the management or collection of the poor-rates, shall be charged or chargeable with any stamp duty whatever.” This is one of the documents there referred to; it was one of the modes for carrying out the provisions of the Act.

Martley and Meagher, contra.

The plaintiffs had no power in their individual capacities to bind the guardians of the union; and if so, a document taken in that capacity cannot be considered to be a document in pursuance of the orders of the Commissioners.

BLACKBURN, C. J.

We are clearly of opinion this bond was exempt from stamp duty, and therefore the cause shown must be allowed, with costs.

ARMSTRONG v. LOUGHNANE and HICKIE.

Nov. 17.

A tenant from year to year died, leaving a widow and an only son, an infant: the widow remained in possession, and subsequently married; her second husband obtained a lease of the premises so held by the deceased for a term of seven years during the minority of the infant. Held, on the expiration of that term, the

EJECTMENT on the title, to recover certain premises in the county of Tipperary.

The case was tried before Pennefather, B., at the last Summer Assizes for that county.

It appeared from the evidence, that previous to the year 1848 the premises in question were held by Richard Loughnane, the father of one of the defendants, as a tenant from year to year, at the rent of £4 per annum, from the grandfather of the plaintiff. Richard Loughnane did not live upon the lands, but sub-let them to occupying tenants, at a profit rent. He died in 1838, leaving a widow, and the defendant Michael Loughnane, an only son, surviving. Michael Loughnane was then a minor. The widow, on the death of her landlord was entitled to maintain an ejectment without serving a notice to quit.

husband Richard Loughnane, entered into receipt of the profit rent and subsequently married the other defendant Hickie, who in 1844 obtained a lease of the premises from the person under whom the plaintiff derived, expressed to be made to him in trust for Michael Loughnane, then a minor, for a term ending the 1st May 1851, when the minor was to attain his full age.

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The interest of the lessor having vested in the plaintiff, he, on the expiration of that term, brought the present ejectment. The plaintiff having closed his case, the defendants called for a nonsuit, on the ground that the tenancy from year to year in Richard Loughnane being still subsisting, it ought to have been determined by a notice to quit; and that being still subsisting and vested in the personal representative of Richard Loughnane as trustee for the next-of-kin, it could not be deemed to have been surrendered by the acceptance of the lease of 1844 by the defendant Hickie.

The learned Judge, being of opinion there was no legal evidence of the determination of the tenancy from year to year, which appeared to be still outstanding, nonsuited the plaintiff.

An order *nisi* having been obtained to set aside this nonsuit—

Rolleston (with him *J. Pennefather*) showed cause.

The tenancy from year to year is still subsisting, and there is nothing to show a surrender of that tenancy. The acceptance of a lease by Hickie could not operate as a surrender by operation of law, as he was not the personal representative of Richard Loughnane, no administration having been taken out to him: *Lessee Reade v. Kennedy* (a). It was there held, that a notice to quit, signed by the mother of an infant as guardian, without any proof of her appointment as such, was insufficient to support an ejectment.—[CRAMPTON, J. The plaintiff has a legal title; is he not entitled to recover on that? you merely show an equitable title.—BLACKBURN, C. J. According to your argument, the title is in the personal representative, who does not exist.]—These parties are all in possession, and they are entitled to be treated as assignees of

(a) 12 Ir. Law Rep. 565.

M. T. 1851. the interest of Richard Loughnane, and that interest could only be
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 got rid of by a surrender by operation of law. *Rees* d. *Meares* v.
ARMSTRONG
v. *Perrott* (a).
LOUGHNANE.

Martley and *Meagher*, contra.

The case of *Rees* v. *Perrott* is in our favour; for that establishes that the landlord, after the death of a tenant from year to year, may treat the party in possession as assignee of the tenant's interest, and he cannot defeat the landlord's interest by setting up an outstanding legal estate. In *Jones* v. *Murphy* (b) the principle is carried still further. There the widow of a deceased tenant from year to year accepted a proposal made to her to give up the possession, she remaining in as caretaker; and the Court held this amounted to evidence of a surrender by operation of law.

BLACKBURNE, C. J.

We are of opinion this nonsuit must be set aside. Richard Loughnane was tenant from year to year; he died in 1838, leaving a widow and infant son, aged eight years. How soon after the death of the tenant, his widow entered into possession of the premises, or married her present husband, does not appear, but it is plain she and her second husband were in possession in 1844. The legal tenancy was not then actually or legally vested in any person, but it was presumptively in the widow while she remained unmarried, and after her marriage in her husband; therefore, according to the authorities, the landlord might have determined the tenancy by serving them with a notice to quit. He then makes a lease to the husband, as guardian of the minor, who plainly had an equitable interest, which the landlord was bound to acknowledge; but he could have no legal title. What then was the operation of that lease? It was made by the landlord to a person in actual possession, and presumptively the assignee of the interest of the original tenant. The Court, therefore, are bound to presume a surrender by operation of law of the original tenancy.

(a) 4 C. & P. 230.

(b) 2 J. & Sy. 323.

CRAMPTON, J.

I feel no difficulty in this case. The single fact stated in the certificate seems to me to rule this case ; that is, when the lease was made in 1844, Hickie was in possession, and being in possession, the primary presumption is that he was in possession as assignee, and therefore the only person competent to give up the possession. He, having taken an interest for a term of years, was the only person who could be considered in legal possession.

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MOORE, J., concurred.*

Order absolute, without costs.

* PERRIN, J., was at Nisi Prius.

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WATKINS v. GERNON.

(*Common Pleas.*)

Nov. 8.

The 19th section of 13 Vic. c. 18, extends to cases in which consents for judgment have been given in actions of debt, as well as where pleas of confession have been given in actions of assumpsit. The words in the above section, "shall within the period limited by the practice of the Court file a plea of confession in such action," do not confine the operation of the section to cases in which the plea has been filed within eight days from declaration.

LAWSON, on behalf of the plaintiff, moved that the Taxing-master should tax, as between party and party, and in the usual manner, the bill of costs furnished by the plaintiff in this cause. The writ in the present action, which was in debt, issued on the 19th of November, for the recovery of the amount of the defendant's acceptance.

The declaration, which was filed on the 14th of January following, and before the publication of the further Orders of January 1851, was in assumpsit, in the form prescribed by the General Orders of the 23rd of December 1850.

On the 22nd of January 1851, the defendant served notice of motion to set aside the declaration, as varying from the writ, upon which the plaintiff entered the usual side-bar rule, and amended the declaration by altering the form from assumpsit to debt.

On the 29th of January 1851, the defendant served notice requiring the plaintiff to give security for costs, on the ground that he was resident out of the jurisdiction; and the plaintiff having acceded to this, the necessary recognizance was executed on the 10th of February 1851, but was not acknowledged until the 1st of May following. The affidavit of the attorney for the plaintiff stated that shortly after the acknowledgment of the recognizance it was agreed, at the request of the defendant's attorney, that a sum of £10 should be paid on account of debt, and £5 costs, and that the defendant should give a plea of confession for the balance, with a stay of execution until the 20th of August 1851, which terms were afterwards carried out; that afterwards, finding that judgment would not be marked in an action of debt upon a plea of confession, he applied to the defendant's attorney to give a consent for judgment, which was done on the 27th of May 1851, and on which judgment was

subsequently entered. That he afterwards furnished his costs, which amounted to £13. 7s. 5d., and issued a summons to tax them; but the Taxing-master declined to enter upon the taxation, considering that under the statute the plaintiff was only entitled to a sum of £5 for costs.

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Lawson, for the plaintiff.

The present case is not within the terms of the 19th section of the 13 *Vic. c. 18* (the Process and Practice Act). First, that section applies only to cases in which the cause has proceeded in regular course, and not to a case in which any unusual proceedings have become necessary in the progress of the cause. This appears from the words, "where such defendant shall, within the time limited by the practice of the Court, file a plea of confession in such action," which import that the section was not intended to apply, for example, to cases in which the time for pleading has been enlarged by special order.—[MONAHAN, C. J. Would not the proviso at the end of the section, that it shall not apply to cases in which, in consequence of the defendant residing out of the jurisdiction, it is necessary to substitute service, seem to imply that but for that proviso the section would have included such cases? Suppose an action for goods sold and delivered, and that it became necessary, in consequence of the plaintiff having furnished an insufficient bill of particulars, to apply to the Court to compel him to give further particulars, would the defendant in consequence of that be deprived of the benefit of this section?—The plaintiff would not be taxed the costs occasioned by what was his own default. But secondly, actions of debt are not within this section, as appears from its using the words "plea of confession." It has been held that under 12 & 13 *Vic. c. 95*, judgment entered upon a plea of confession is within the saving of judgments on *cognovits* contained in second section of that Act: *Gibbons v. Magan* (a).

Meagher, for the defendant.

The construction of the 19th section contended for by the plaintiff, viz., that actions of debt are not intended to be provided for

(a) 2 Ir. Jur. 60.

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by this section, would lead to this result—that in case of judgment by default in actions of assumpsit, in which there must be an interlocutory judgment, and an inquiry to assess damages, the plaintiff could only recover £5 costs; but in actions of debt, in which the judgment is final, full costs may be recovered. The object of the section was to provide for all undefended actions.

Lawson, in reply.

MONAHAN, C. J.

We are of opinion that the present case falls within the terms of the 19th section of the 13 Vic. c. 18, and that it is not within the terms of the proviso of the 13 Vic. c. 19. The 19th section of the former Act enacts:—"That in all cases in which judgment shall be permitted to go by default, or where said defendant shall within the period limited by the practice of the Court file a plea of confession in such action, no taxation of costs on the part of the plaintiff shall take place; but the officer of the Court in which such judgment shall be signed shall, and he is hereby required, in case the writ of summons shall have been served in Dublin, to add to such judgment the sum of £5, as and for the plaintiff's costs; but if the writ of summons shall have been served elsewhere in Ireland, then the sum of £6 shall be added, for such costs of the plaintiff, to such judgment." And the amended Act, after reciting the above section, declares "that it shall apply only to cases of judgment by default in personal actions, brought for recovery of liquidated sums under twenty pounds." It has been insisted in the first place, that this is not a judgment recovered upon a plea of confession, and that the section only applies to actions of assumpsit, and that it does not include actions of debt, to which a plea of confession is not applicable. But we do not accede to that interpretation; it appears to us that it was the intention of this section to embrace all cases of undefended actions, and that it was intended to apply to actions of debt as well as assumpsit, although in point of form the cause of action may in one case be confessed by a consent for judgment and in the other by a plea of confession. With

regard to the amended Act which has been referred to, it appears to us to have no bearing upon the present case, and to refer only to cases in which judgment is permitted to go by default, and not to cases in which pleas of confession or consents for judgment are given. But secondly, it was argued, that in order to bring the case within the 19th section of the Process and Practice Act, the plea of confession should have been filed within eight days from filing the declaration, the ordinary period within which a plea is filed, and that we must give this construction to the words, "where the defendant shall within the period limited by the practice of the Court file a plea of confession;" but it is sufficient to say, that the time limited by the practice of the Court for filing a plea may vary in different cases. The defendant may by special application to the Court have obtained further time to plead, or the plaintiff may reside out of the jurisdiction, and the action may be stayed until he shall give security for costs, in which case the defendant could not be bound to plead until that security was given. In all these cases the defendant may be said, in the terms of the section, "to plead within the time limited by the practice of the Court," unless we are to insert the words "without special application to the Court," which we have no authority to do. This motion must therefore be refused with costs.

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 GERNON.

Motion refused.

NOLAN v. FITZGERALD.

S. FERGUSON, with whom was *Macdonogh*, moved that the order made by Mr. Justice MOORE on the 23rd of October 1851 might be set aside as irregular, in not stating specifically the affidavits upon

Nov.

On an application to substitute service under the 9th section of 13 Vic. c. 18,

on the ground that the defendant is resident out of the jurisdiction, it is not necessary that the affidavit in support of the motion should state that the defendant has not been personally served with the writ of summons, and has not appeared according to the exigency thereof.

An order that service upon Messrs. A and B (partners) shall be deemed good service upon the defendant, is not complied with by serving one of those partners at a place which is not their place of business.

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which it purported to be grounded, and inasmuch as the affidavits did not state that the defendant was not personally served with the writ of summons, and had not appeared according to the exigency of the writ, or (save by information and belief), that the defendant resided out of the jurisdiction; and also that the parliamentary appearance might be set aside, as being founded on an irregular order, and inasmuch as the affidavit of service of the writ of summons, pursuant to the order of the 23rd of October 1851, was defective.

The present action was brought to recover the amount of the defendant's acceptance for £500.

On the 23rd of October 1851, an order was made by Mr. Justice MOORE, in chamber, which professed to be made "on reading affidavits" that service of the writ of summons and of the order on Messrs. Guinness and Mahon, the land-agents of the defendant, should be deemed good service of the writ on the defendant; and it was further ordered that a copy of the writ and order should be left with the said agents for the said defendant, and that the service be made within ten days, and that the defendant should have ten days to appear. The affidavit of the plaintiff's attorney (assumed to be that upon which the order was made) stated that he was *informed and believed*, that the defendant had no fixed residence in Ireland, and that he *had heard and believed* that he was then resident on the Continent of Europe, but where precisely, the deponent was unable to state; that he was possessed of considerable landed property, and that Messrs Robert R. Guinness and R. P. Mahon were his land-agents; that he applied for defendant's address at their office, which they declined to give, but promised to forward to him any communications they might receive. That upon this the deponent inclosed to Messrs. Guinness and Mahon a letter applying to the defendant for payment, but that he had not received any satisfactory reply. The affidavit of the process-server stated that he had effected the service directed by the order of the 23rd of October 1851, in the usual way, upon Robert R. Guinness, one of the partners of the firm of Guinness and Mahon, at the Bank of Ireland, and that he subsequently left, at the place of business of the firm, a letter directed to the defendant, enclosing a copy of the writ, which they promised to forward to him.

Fitzgibbon objected that the defendant had not appeared, and that he could not therefore institute the present motion.

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MONAHAN, C. J.

If he appeared he would waive the irregularity. We must hear the motion.

S. Ferguson, for the defendant.

The order is irregular, for the reasons specified; it does not specify the affidavits upon which the order was founded: *Morris v. McCormick* (a); *Needham v. Bristow* (b); *Heath v. Nesbitt* (c). But even assuming the affidavits are sufficiently described, the only ones which appear upon the file are not sufficient to support the order; they do not state that the defendant has not been personally served, and has not appeared according to the exigency of the writ. In the construction of the 9th section of the 13 Vic. c. 18, the words "such defendant" must mean such defendant as is described in the previous part of the sentence, that is, a defendant who has been served and has not appeared: such is the construction given to the English statute 2 W. 4, c. 39, s. 3, to which this section corresponds: *Reid v. Ford* (d); *McAlpin v. Gregory* (e); in which cases it has been held that the Court will not grant liberty to enter an appearance, without a statement in the affidavit stating that the defendant has not entered an appearance.—[MONAHAN, C. J. In all those cases the statement in the affidavit was a sort of negative pregnant, as that he had not appeared according to the exigency of the writ, which would be consistent with his having appeared on the ninth day. But whatever may be the ground of those decisions, we do not agree to the construction you propose to give to the 9th section of this Act. It appears to us that it professes to deal with two classes of persons, one class who are within the jurisdiction, and on whom, if they could be found, service might be effected; but the latter clause relates to persons who are not resident within

(a) 11 Ir. Law Rep. 45.

(b) 4 Scott's N. R. 773.

(c) 2 Dowd. N. S. 1041.

(d) 7 Jurist. 492.

(e) 1 C. B. 299.

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the jurisdiction, and on whom it would be useless to attempt to effect personal service; and I do not think that portion of the section is governed by what precedes. When an application is made to serve such a party, all that is necessary to show is, that he resides out of the jurisdiction, and that there is such a person, as is required by the Act, within the jurisdiction, upon whom service can be substituted.]—The affidavit only states the defendant's residence on information and belief, which is not sufficient: *Anonymous* (a).—[BALL, J. The very first statement there is at variance with our present practice: on a motion to have service already effected deemed good, we do require positive swearing as to the fact of the defendant being in the house.]—The service was not effected pursuant to the order of the 23rd of October 1851, which directed the service to be effected upon both partners; the service effected was only on one, at a place not the place of business of the firm.

Concannon (with whom was *Fitzgibbon*), for the plaintiff, was desired to confine himself to the question as to whether the service was effected pursuant to the order. The affidavit shows that Mr. Guinness accepted the writ and promised to forward it to the defendant. It would lead to great inconvenience if, in cases where service is directed to be substituted by serving a firm, all the members of the partnership should be served.—[MONAHAN, C. J. Supposing we direct a substitution of service on the law and land agent of the defendant, and that one of them is served, would that be a compliance with the order, although the writ was forwarded to the defendant? or suppose you first serve one, and then the other, would not the time to appear run from the time of the last service?]
Each partner represents the firm. This is an application to the discretion of the Court; and if it appears that a copy of the writ has reached the defendant, the Court will not disturb the proceedings.

Cur. ad. vult.

Nov. 22.

MONAHAN, C. J.

On the discussion of the motion, we were unanimously of opinion that the order made by my Brother MOORE in chamber was correct.

(a) 4 Law Rec. O. S. 180.

On the other portion of the case, namely, whether a service had been effected in pursuance of that order, we reserved our judgment; and with respect to that, the majority of the Court are of opinion that the order has not been complied with, inasmuch as that order directed a service upon Messrs. Guinness and Mahon, and the service effected was upon one of those parties at the Bank of Ireland. We must therefore set aside the parliamentary appearance, but without costs, and we will give an order now to substitute service upon either of these parties personally.*

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* The attorney for the defendant agreed to accept service of the writ, and to enter an appearance, in consequence of which no order was taken out.

SCOTT

v.

MIDLAND GREAT WESTERN RAILWAY COMPANY.

Nov. 18, 26.

RICHARD ARMSTRONG, on behalf of the defendants, moved for an interpleader rule, calling upon the plaintiffs, and certain persons named Mortimer Kealy and Thomas Kealy, to appear and state the particulars of their claims, and maintain or relinquish the same.

The Court will not grant an interpleader rule under the 9 & 10 Vic. c. 64, at the instance of a Railway Company, with whom goods have been deposited, on the ground that a third party asserts a title to the goods, adverse and paramount to the bailor.

It appeared from the affidavit of the secretary of the Company, that on the 2nd of August the plaintiff applied to the station master at Galway to carry certain goods by the train to Dublin; that after the delivery of the goods at the Company's stores in Galway, a notice was served by the solicitor of the Messrs. Kealy, stating that the goods were their property, and that they had been wrongfully taken out of their possession by the plaintiff, and threatening the Company with an action if the goods were sold. The defendants transmitted the goods to Dublin by the next train, where they were deposited in the Company's stores. The affidavit then stated that, since the arrival of the goods in Dublin, the defendants had been

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served with an order made by the Commissioners of Bankrupt, in the matter of Mortimer Kealy, a bankrupt, directing the plaintiff, as assignee of the Kealys, to return the goods to the persons from whom they were taken in Galway. That on the 12th of August the plaintiff and defendants were served with a writ at the suit of the Kealys, to which they appeared, and that although no declaration had since been filed, the deponent had no doubt that the claim of the Kealys in their action, was the same as that of the plaintiff in the present. The affidavit further stated that, with a view to save the expense of the application, and prevent any loss to the goods by detention, the deponent endeavoured to ascertain who was the party properly entitled to the same; but from the conflicting statements and claims made by the respective parties, and the many legal questions involved, the defendant was totally unable to undertake the settlement of the question; that the Company did not claim any interest in the subject-matter of the suit, and that they sought the protection of the Court *bona fide*.

The declaration in the present case, which was in trover for the conversion of goods, was filed on the 8th of November 1851.

Otway, for the plaintiff.

An order for interpleader, under the 9 & 10 *Vic.* c. 64, can only be obtained in cases in which previous to the statute the party could have filed a bill for that purpose. This is apparent from the preamble of the Act. It is not competent for the vendee of goods to set up a title adverse and paramount to his bailor, when called upon to deliver the goods, which have been delivered; he is bound by his contract to deliver the goods according to the order of the person from whom he has received; although if the bailor have himself created a title in third parties, the bailee may acknowledge such title, without infringing the rule which prevents an agent from denying the title of his principal: *Pearson v. Cardon* (a); *Crawshaw v. Thornton* (b); *Braddick v. Smith* (c); *James v. Pritchard* (d); *Patorini v. Campbell* (e). It does not appear by the affidavit that

(a) 2 R. & M. 606.

(b) 2 M. & C. 1.

(c) 9 Bing. 84.

(d) 7 M. & W. 216.

(e) 12 M. & W. 277.

the carriage of the goods has been paid for ; the Company, therefore, have a lien on the goods as against Scott, though not against the Kealys.

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Armstrong, in reply.

The cases cited are distinguishable ; in all of them the party seeking the interpleader order had bound himself by some express contract to one of the parties ; here there was a mere acceptance of goods. In an unpublished case of *Braddyll v. Littledale*, the Court of Queen's Bench directed an issue, at the instance of an auctioneer with whom goods had been deposited, to ascertain the title.

Cur. ad. vult.

MONAHAN, C. J.

This is an application by the Railway Company, the defendants, for an interpleader order under the statute, as between the plaintiff Scott and the Messrs. Kealy. The facts of the case, so far as the present motion is concerned, are few and simple. In the month of June or July, Scott delivered a quantity of goods to the defendants in Galway, to be carried for him and delivered to him in Dublin. Immediately after the delivery, the Messrs. Kealy served a notice on the Company, claiming the goods as theirs, and alleging, as they now do by their affidavit, that Scott got possession of the goods either by fraud or trespass, or perhaps both. Both parties have commenced actions against the Company, and the only question for us is, is this a case of interpleader within the statute ?

Nov. 26.

The first thing to be considered is, what is the rule on the subject in Courts of Equity ? From the case of *Crawshaw v. Thornton* (a) the general rule was established, that an agent could not oblige his principal to interplead with a stranger who claimed the goods by title paramount ; but some little doubt existed as to whether this rule as to principal and agent applied to the ordinary cases of bailment, or of goods deposited with a warehouseman or carrier. In p. 21 of that case, Lord Cottenham says :—" On the part of the plaintiff it was contended that the case must be regulated by the

(a) 2 M. & C. 1.

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“rule in cases of bailment. It will be to be considered what that rule is ; but that rule, if in favour of the interpleading, would not be decisive, because in the case of simple bailment there is no personal undertaking and no liability to right of action beyond that which arises from the legal consequences of the *bailment*.” He then, in his usual clear manner, reviews all the cases, particularly those throwing any doubt on the subject, and states clearly his opinion, that even in the simple case of bailment the bailee cannot oblige the bailor to interplead with a person claiming by title paramount ; and several of the cases referred to are those of carriers, that is, ship-owners. The case of *Pearson v. Cardon* (a), before Lord Brougham, is to the same effect. These cases have clearly established what the rule in equity is. The only remaining question is, is the rule at law different under the statute ? Certainly, in *Lucas v. The London Dock Company* (b), very eminent Counsel argue, and it is apparently assented to by the Court, that the remedy given by the statute is not confined to cases in which the party could have had relief in equity ; but that case was scarcely argued, and though the Court made a rule under the Interpleader Act binding an absent party, it is not at all properly a case of interpleader, as the defendant admitted the title of one of the parties, and offered to give up the goods. It is now clearly settled that the rule at law is the same as in equity. In the case of *Patorini v. Campbell* (c) Alderson, B., lays down the rule expressly :—“In interpleading cases we follow the rule in equity.” And accordingly the Court in that case adopted the decision of Lord Cottenham in the case of *Crawshaw v. Thornton* (d).

Mr. Otway referred to the case of *James v. Pritchard* (e), in which a party, who bought a rick of hay of an executor *de son tort*, was held not entitled to oblige his vendee to interplead with the administrator ; and the rule is laid down that he who has entered into a contract must perform it, or show by plea why he does not. *Slaney v. Sidney* (f) is precisely to the same effect,

(a) 2 R. & M. 606.

(b) 4 B. & Ad. 378.

(c) 12 M. & W. 277.

(d) 2 M. & C. 1.

(e) 7 M. & W. 216.

(f) 14 M. & W. 800.

deciding that a party who buys goods cannot oblige his vendor to interplead. M. T. 1851.
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These however are cases in which, there being a sale, it may be said what the different parties sought for was different, one a stipulated price, the other the thing itself or its value. But the case of *Lindsay v. Bacon, executors of Bacon* (a), is more in point; in that case Mr. Bacon, having plate of a client in his possession, borrowed money as if for that client on the security of the plate. On Bacon's death both parties sued the executor for the plate; and the Court held that it was not a case for an interpleader, and the rule was refused. The latest case I have been able to find on the subject is still more in point, namely, *Horton v. Lord Devon* (b). The defendants, trustees of the Duke of Bridgewater, were the defendants who applied for an interpleader order. They had received goods for the Coalbrook Dale Company, and by their order transferred them to B, and by B's order to one Poolley, who transferred them to the plaintiff, to whose account they were placed in the defendant's books. The goods were afterwards claimed by the Coalbrook Dale Company, on the ground that the plaintiff got them *by fraud*; and the Court, in discharging the rule, held that it was not a case for an interpleader. This case is not to be distinguished from the present, and it was decided expressly on the authority of the cases in Courts of Equity. We can therefore make no rule in this case.

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No rule.

(a) 6 C. B. Rep. 291.

(b) 4 Ex. 497.

M. T. 1851.

Exchequer.

The Rev. EDWARD EYRE MAUNSELL

v.

The Hon. WM. HENRY HARE WHITE HEDGES and

The Rev. RICHARD DAVIES, Clerk.

(Exchequer.)

Nov. 22, 24.

Action brought by the direction of the Lord Chancellor. Assumpsit, on an account stated between the plaintiff and R. H. E., deceased. The executors of R. H. E. pleaded non-assumpsit and Statute of Limitations (Lord Ten-terden's Act). At the trial a special verdict was taken, in which the following (amongst other) facts were found:— That three accounts were stated and settled in February 1825 by

and between the plaintiff and the said R. H. E. ; and on the 20th of February 1828 R. H. E. wrote a letter to the plaintiff, in which was contained these passages :— “Should I receive the mortgage of Mr. L., I shall be able to settle with you.” “ You may be assured that I am anxious that our accounts should be arranged as soon as possible ; nothing delays it but my having the means, which the Barna business, if settled, would enable me to do ;” that the amount of the Barna mortgage debt was paid to R. H. E. in November 1835, and the action was, by the leading order, to be admitted to have been brought within six years from November 1835.

Held, that there was a sufficient promise to pay contained in the letter.

Held also, that such a promise does not require a new consideration to support it, whether the contingency happen within or after six years from the date of the promise.

Held also, that the statute began to run from the period at which the contingency happened.

THIS action was brought by the plaintiff in pursuance of a decretal order made by the Lord Chancellor (Brady), bearing date the 27th of July 1850, and which order was in the following words :—“ Let “the said Edward Eyre Maunsell proceed to bring such action at “law as he may be advised against the plaintiffs the Hon. William “Henry Hare White Hedges and the Rev. Richard Davies, the “acting executors of Robert Hedges Eyre, deceased, for the sums “reported due to the said Edward Eyre Maunsell in this cause ; and “in order that the effect of the Statute of Limitations on the de- “mands of the said Edward Eyre Maunsell may be tried on such “trial, the said executors, defendants in the said action, are to admit “that the said Robert Hedges Eyre was indebted to the said Edward “Eyre Maunsell in the sums of £1317. 7s. 3d., £808, and £314. “4s. 9½d., upon three several accounts stated and settled between the “said Edward Eyre Maunsell and the said Robert Hedges Eyre in the “month of February 1825 ; and the said executors, the defendants “in the said action, are further to admit as evidence, without further

“proof thereof, the letter from the said Robert Hedges Eyre to the
 “said Edward Eyre Maunsell, bearing date the 20th of February
 “1828. And the said executors, the defendants in the said action,
 “are further to admit that the said Robert Hedges Eyre was on the
 “14th day of November 1835 paid the amount of a mortgage debt
 “affecting the lands of Barna, in the county of Galway, the estate
 “of Marcus Blake Lynch, Esq., mortgaged by the said Marcus
 “Blake Lynch to the said Robert Hedges Eyre previous to the year
 “1828, and for the foreclosure of which mortgage a suit in the Court
 “of Exchequer was pending in the year 1828. And the said de-
 “fendants in the said action are further to admit that the said action
 “was commenced after the death of the said Robert Hedges Eyre,
 “and within six years after the said 14th of November 1835. The
 “question to be tried in this action to be, the effect of the Statute of
 “Limitations on the said demands of the said Edward Eyre Maun-
 “sell.”

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The plaintiff declared in assumpsit; the declaration contained three counts. The first count, after stating that Robert Hedges Eyre was, on the 25th of February 1825, indebted to the plaintiff in a certain sum of money on an account then and there stated, &c., and “being so indebted, the said Robert Hedges Eyre, in consi-
 “deration thereof, then and there promised the plaintiff to pay him
 “the said money on request,” proceeded to aver that the money re-
 “maining unpaid, &c., the said Robert Hedges Eyre, “heretofore, to
 “wit, on the 20th of February A. D. 1828, to wit at, &c., in consi-
 “deration of the premises, and that the plaintiff, at the request of
 “the said Robert Hedges Eyre, would forbear and give time to the
 “said Robert Hedges Eyre for the payment of the said sum of
 “money until the payment to him the said Robert Hedges Eyre of
 “a certain mortgage debt next hereinafter mentioned, by a certain
 “letter bearing date the 20th of February A. D. 1828, then and
 “there signed by him the said Robert Hedges Eyre in his lifetime,
 “undertook and promised the plaintiff to pay the said money to
 “him the plaintiff, when he the said Robert Hedges Eyre should be
 “paid a certain mortgage debt, to wit, the mortgage of Mr. Lynch
 “in the said letter mentioned.” The plaintiff then averred the

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 HEDGES. payment of the said mortgage debt to the defendant, on the 14th of November 1835, and forbearance on his own part, and breach by the said Robert Hedges Eyre and the defendants. The second count was substantially the same as the first;* it set out, however, *in hæc verba*, the letter mentioned in the first count. The third count was the common count on an account stated between the plaintiff and the said Robert Hedges Eyre. The defendants pleaded two pleas: first, non-assumpsit; secondly, that the several alleged causes of action did not nor did any of them accrue to the plaintiff within six years next before the commencement of this action, &c.

The plaintiff replied as to the first, *similiter*; as to the second, that "the several causes of action in the declaration mentioned, and "each of them, did accrue to the plaintiff within six years next "before the commencement of this suit," &c.

The case was tried before the LORD CHIEF BARON at the Sit-tings after Easter Term 1851, and a special verdict was taken. The special verdict was as follows:—

"Afterwards, that is to say, on the day and at the place within
 "contained, before the Right Honorable DAVID RICHARD PIGOT, the
 "Lprd Chief Baron within mentioned, at the Sittings after Easter
 "Term, in the year of our Lord 1851, at the Court of Nisi Prius,
 "Dublin, came the parties within named, by their attorneys, and the
 "jury also being summoned, came; who, to speak the truth of the
 "matters within contained being chosen, tried and sworn, say upon
 "their oath that Robert Hedges Eyre, the testator within named,
 "was indebted to the said Edward Eyre Maunsell, the plaintiff
 "within named, in the several sums of £1317. 7s. 3d., £808, and
 "£314. 4s. 9d. upon three several accounts stated and settled be-
 "tween the said Edward Eyre Maunsell and the said Robert
 "Hedges Eyre in his lifetime, in the month of February in the year
 "of our Lord 1825; and which said account, on which the said
 "balance of £1317. 7s. 3d. was so ascertained, was stated and settled
 "between the said Edward Eyre Maunsell, as administrator of
 "William Meredith deceased, and the said Robt. Hedges Eyre; that

* Those two counts are not given more particularly, as they were not much relied on in the argument.

“ the said Robert Hedges Eyre being possessed of and entitled to
 “ a certain mortgage affecting the estate of one Marcus Blake Lynch
 “ of Barna in the County of Galway, for a sum of over £9000, did,
 “ on the 20th of February in the year of our Lord 1828, write to
 “ the said Edward Eyre Maunsell a letter in the words and figures
 “ following, that is to say:—‘ Dear Maunsell—I have received your
 “ ‘ letter, and am concerned that I cannot comply with your wish of
 “ ‘ accepting the bill you enclosed me, as I could not be certain of
 “ ‘ having means to discharge its contents at the time of payment.
 “ ‘ Should I receive the mortgage of Mr. Lynch, I will then be able
 “ ‘ to settle with you. I did expect that you would have said some-
 “ ‘ thing of the Barna business, which you and your brother have
 “ ‘ unfortunately dragged me into, and out of which it is your
 “ ‘ interest as well as duty to extricate me. Your brother George
 “ ‘ has not given me one penny out of the Galway estate for the
 “ ‘ last eighteen months. The heavy annuities paid out of the Tip-
 “ ‘ perary estate, with the unfortunate transaction with Mr. Graydon,
 “ ‘ has made that totally unproductive; so that you must see the
 “ ‘ distressed state in which I am placed, having only the produc-
 “ ‘ tion of the County Cork estate to live on. At my time of life,
 “ ‘ to be really in want, with a large nominal property, is what I
 “ ‘ could not expect. I hope the Galway estate will now prove pro-
 “ ‘ ductive. I wish I had taken it into my own hands long since;
 “ ‘ it was time to change my agent there. You may be assured that
 “ ‘ I am anxious that our accounts should be arranged as soon as
 “ ‘ possible; nothing delays it but my having the means, which the
 “ ‘ Barna business, if settled, would enable me to do. Best wishes
 “ ‘ for Mrs. Maunsell.—Yours truly, “ ‘ ROBERT HEDGES EYRE.
 “ ‘ February 20th, 1828.’

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“ That the said Robert Hedges Eyre duly signed said letter, and
 “ delivered same to the said Edward Eyre Maunsell. That the said
 “ Robert Hedges Eyre, on the 14th day of November, in the year
 “ of our Lord 1835, was paid the sum of £9900, being the full
 “ amount of said mortgage debt in said letter mentioned, affecting
 “ the lands of Barna in the county of Galway, the estate of the
 “ said Marcus Blake Lynch. That said lands were mortgaged by

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“said Marcus Blake Lynch to the said Robert Hedges Eyre,
 “previous to the year 1828. That for the foreclosure of said
 “mortgage a suit in the Court of Exchequer at the equity side
 “thereof was pending in the said year 1828. That the said action
 “within mentioned was commenced after the death of the said
 “Robert Hedges Eyre, against the defendants within named, as the
 “executors of said Robert Hedges Eyre, and was so commenced
 “within six years after the said 14th day of November 1835, the day
 “on which said mortgage debt was so received by the said Robert
 “Hedges Eyre. That long before and during the said month of
 “February 1825, and from thence continually until the year 1840,
 “the said Edward Eyre Maunsell held certain lands and tenements
 “as tenant thereof to the said Robert Hedges Eyre, at a rent of
 “£49. 14s. 7d. per annum, payable to the said Robert Hedges Eyre
 “by the said Edward Eyre Maunsell. That from the 25th day of
 “March 1828 to the 25th day of March 1840, the said Edward
 “Eyre Maunsell, with the knowledge and assent of the said Robert
 “Hedges Eyre, retained said rent as same accrued, to the amount of
 “£588, in payment, so far as same would reach, of the said sums of
 “£808 and £314. 4s. 9d. That said rent so retained was sufficient
 “to pay and discharge, and did pay and discharge in full, the said
 “sum of £314. 4s. 9d., and that same, after the payment of said sum
 “of £314. 4s. 9d. was so retained on foot of said sum of £808, and
 “to the extent of £274 discharged the same. But whether or not
 “on the whole matter aforesaid, by the jurors aforesaid, in form
 “aforesaid, found, the said several causes of action within mentioned,
 “or any of them accrued to the said plaintiff at any time within six
 “years next before the commencement of this suit, in manner and
 “form as the said plaintiff hath within thereof complained against
 “the said defendants, the jurors aforesaid are altogether ignorant;
 “and thereupon they pray the advice of the Court of our said Lady
 “the Queen, before the Barons of her Exchequer, at the Queen’s
 “Courts Dublin. And if upon the whole matter it shall seem to the
 “said Court that the said several causes of action in the plaintiff’s
 “declaration within mentioned, upon the said three several accounts,
 “did accrue at any time within six years next before the commence-

“ment of the suit in manner and form as the plaintiff hath within
 “thereof complained, then the jurors aforesaid, upon their oaths
 “aforesaid say, that the said Robert Hedges Eyre in his lifetime did
 “undertake and promise in manner and form as the said plaintiff
 “hath within thereof complained against the said defendants; and
 “in that case they assess the damages of the said plaintiff by reason
 “thereof, over and above his expenses and costs by him about his
 “suit in this behalf laid out and expended, to £1850. 18s. 5d., and
 “for those expenses and costs, six pence. And if upon the whole
 “matter it shall seem to the said Court that the said cause of action
 “in the plaintiff’s declaration mentioned, as to the said sums of £808
 “and £313. 4s. 9d. within mentioned, did accrue at any time within
 “six years next before the commencement of this suit; but that the
 “said cause of action as to said sum of £1317. 7s. 3d. did not accrue
 “within six years next before the commencement of this suit, in man-
 “ner and form as the said plaintiff hath within thereof complained,
 “then the jurors aforesaid, upon their oaths aforesaid say, that the
 “said Robert Hedges Eyre in his lifetime did undertake and promise
 “as the said plaintiff hath within thereof complained against the
 “said defendants; and in that case they assess the damages of the
 “said plaintiff by reason thereof, over and above his expenses and
 “costs by him about his suit in this behalf laid out and expended, to
 “£533. 11s. 2d., and for those costs and expenses six pence. But if
 “upon the whole matter aforesaid, it shall seem to the Court that
 “the said several causes of action within mentioned, or any of them,
 “did not accrue to the said plaintiff at any time within six years
 “next before the commencement of this suit, in manner and form as
 “the said plaintiff hath within thereof complained against the said
 “defendants, then the said jurors, upon their oaths aforesaid say,
 “that the said Robert Hedges Eyre did not undertake and promise
 “in manner and form as the said plaintiff hath within complained
 “against the said defendants.”

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There was also read a certain letter from the defendants’ attorney
 to the plaintiff; it was in these words:—

“Leeson-street, 10th June 1851.

“SIR—I hereby undertake on the part of the defendants that, for

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“the purpose of any arguments or questions that may arise in this
 “case, founded upon the letter of the 20th of February 1828, the
 “three sums of £314. 4s. 9d., £808 and £1317. 7s. 3d., shall be
 “deemed to be due to the plaintiff in his own right; and I also
 “undertake that no objection will be raised for misjoinder or vari-
 “ance on the ground of the said sum of £1317. 7s. 3d. being stated
 “in the special verdict to be due to the plaintiff on an account stated
 “and settled between the plaintiff, as executor of William Meredyth,
 “deceased, and the late Robert Hedges Eyre.—I am your obedient
 “servant,
 “To Charles Studdert, Esq., plaintiff’s attorney,
 4 College-green.”*

“JOHN LITTON.

Graves Cathrew (with whom were *G. Fitzgibbon* and *Francis A. Fitzgerald*, for the plaintiff) now opened the case on the special verdict.

The propositions principally contended for were these :—

First—That the letter of the 20th of February 1828 contained a sufficient acknowledgment of a debt to satisfy the exigency of Lord Tenterden’s Act.

Secondly—That where there were two or more debts, and a general acknowledgment given sufficient to include them, *prima facie* it applied to them both, and was sufficient.

Thirdly—That the Statute of Limitations only commenced to run from the time the event mentioned in the letter happened.

In support of the first proposition, after reading the provision of the 9 G. 4, c. 14, s. 1, “That no acknowledgment or promise by
 “words only shall be deemed sufficient evidence of a new or con-
 “tinuing contract whereby to take any case out of the operation of
 “the said enactments, or either of them, or to deprive any party of
 “the benefit thereof, unless such acknowledgment or promise shall be
 “made or contained by or in some writing, to be signed by the party
 “chargeable thereby,” Counsel commented on the letter of the 20th of February 1828, and relied particularly on the concluding passage as amounting to an express promise to pay without delay as soon

* This letter is introduced to explain why what appears from the facts stated in the special verdict to have been a misjoinder was not taken advantage of.

as R. H. Eyre got the mortgage money; and cited, as instances of promises held sufficient, *Edmunds v. Downes* (a); *Dabbs v. Humphries* (b); *Bird v. Gammon* (c); *Tanner v. Smart* (d); *Frost v. Bengough* (e). That it was unnecessary the amount of the debt should be specified: *Dickenson v. Hatfield* (f); *Lechmere v. Fletcher* (g). That it is not necessary to refer specifically to a debt: *Frost v. Bengough* (h). That case shows that a promise sufficient *prima facie* to apply to the debt in question, does apply to it in the absence of evidence the other way, and that it devolves on the defendant to show that it had a restricted application or a different one. That there is no analogy between a general payment and a general acknowledgment when there are two debts; as the creditor can appropriate the payment, and it becomes a payment on account of either debt by the act of the creditor, and not of the debtor, it cannot therefore be evidence of a fresh promise on the part of the debtor, which is the entire effect of a payment: *Gowan v. Forster* (i).

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The third proposition, that the statute only begins to run from the time the contingency happens: *Tanner v. Smart*; *Hayden v. Williams* (k); *Waters v. Lord Thanet* (l); *Humphreys v. Jones* (m); *Hart v. Prendergast* (n).

In reference to the second branch of the special verdict, viz., the retention of the rents, it was conceded by the Counsel for the defendants that they could not resist the judgment of the Court being given for the plaintiff on the reservation in the special verdict as to that part of the case.

R. Warren (with him *H. Martley* and *Isidore Blake*), for the defendants.

The letter is insufficient, as it does not identify any particular

(a) 2 C. & M. 459.

(c) 5 Scott, 213.

(e) 1 Bing. 266.

(g) 1 C. & M. 623.

(i) 3 B. & Ad. 511.

(l) 2 Q. B. 757.

(b) 10 Bing. 446.

(d) 6 B. & C. 603.

(f) 5 C. & P. 46.

(h) *Supra*.

(k) 7 Bing. 163.

(m) 14 M. & W. 1.

(n) 14 M. & W. 741.

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debt. Here there are several debts: *Kennett v. Millbank* (a). There is evidence on the face of the special verdict from which a presumption may be raised that the letter did not refer to those three debts, payments, on account of two of them having been made almost immediately after the letter was written. The letter does not contain any acknowledgment from which a promise to pay can be implied: *Hart v. Prendergast* (b). Where a promise is made, with a condition annexed, and that condition is fulfilled within six years, there is then a simple promise within six years to support the promise in the replication; but if the condition does not happen until after six years from the time of the promise being made, then the replication is not supported. That there cannot be co-existing two promises in relation to the same debt—a promise to pay on request, which is the promise implied by law on an account stated, and a promise to pay on a particular event by the contract of the parties, unless there be a new consideration for the new contract: *Hopkins v. Logan* (c). Parke, B., there says:—"The promise which arises "in law upon an account stated is to pay on request, and any other "promise is *nudum pactum*, unless made upon a new consideration. "At the time of the alleged promise the party is liable to pay in "præsentî on request; and if by a simple promise, without fresh "consideration, there can be a contract for future payment, the Statute of Limitations may be defeated by a mere verbal promise." If by the promise here relied on it is sought to make time run from the happening of the event, and not before, then it is relied on as a new contract postponing the payment of a debt which was at the time the promise was given payable on request; and there must, on the authority of that case, be a new consideration.—[PENNEFATHER, B. Before the passing of Lord Tenterden's Act there must have been many promises to pay when able, and the like; and I am not aware of any authority that the contingency must happen within six years in order to render the promise available. Is there any case expressly deciding that the six years do not begin to run until the contingency happen?—I think not. The distinction between simple acknow-

(a) 1 M. & Scott, 102.

(b) 14 M. & W. 741.

(c) 5 M. & W. 241.

ledgments and those with a condition annexed to them is, that in the one the original debt is a sufficient consideration for the promise, for the effect is to revive the original debt and promise implied by law from it for the time allowed by the statute; but when the promise is of a different nature from that implied by law, it cannot be said to be a revival of the old debt, and the promise resulting from it, and then an additional consideration is requisite. The application of the Statute of Limitations might be indefinitely deferred in this way.—[PIGOT, C. B. That argument would apply equally whether there was consideration or not. Would a simple acknowledgement of a debt and a promise to pay it in seven years be good?—No; the law will imply from the acknowledgment of the debt a promise to pay on request, and two inconsistent promises cannot co-exist: *Kaye v. Dalton* (a); *Roscorla v. Thomas* (b); *Irving v. Veitch* (c); 5 Vin. Abr., p. 545.

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Fitzgibbon, in reply.

It must be inferred from *Tanner v. Smart*, and that class of cases, that time begins to run from the period at which the contingency happens, and not before; but *Waters v. Lord Thanet* decided expressly that time began to run from the happening of the event. It is immaterial whether a condition annexed to an acknowledgment be removed within six years or afterwards, for the date of the acknowledgment is unimportant; the time at which the acknowledgment or promise became such as to imply or express a promise to pay on request, and so support the promise in the declaration, is the question, and that time arrived when the condition was removed. The age of the promise to pay on request, and not of the acknowledgment, is the important consideration.

It is not necessary that the promise should specify the particular nature or amount of the debt: *Dalby v. Cheslyn* (d). The proof of the condition being fulfilled is all that is necessary to raise the liability: *Fenton v. Embless* (e); *Heylin v. Hastings* (f), cited in

(a) 7 M. & Gr. 807.

(b) 3 Q. B. 234.

(c) 3 M. & W. 90.

(d) 4 Y. & C. 238.

(e) 1 Wm. Black. 353.

(f) 1 Ld. Raym. 389; also Carthew's Rep. 470.

M. T. 1851. *Tanner v. Smart* by Lord Tenterden. It is clear the promise must have applied to all debts existing between the parties; the words “settle with you and arrange our accounts” would be inapplicable if only some of the debts were to be settled. The onus of showing the letter refers to other debts, or only to some of those in question, devolves on the defendants: *Frost v. Bengough* (a). Parke, J., says :—“But in this case a paper is produced which, though ambiguous, is sufficient to shift on the defendant the onus which was at first on the plaintiff; the defendant might have shown, if he could, there were other matters to which the letter applied.”

The Court here intimated to Mr. *Fitzgibbon* that it was unnecessary for him to proceed further.

PIGOT, C. B.

We are all of opinion that there should be judgment for the plaintiff. The first question that arises in the case is on the construction of the letter of the 20th of February 1828, written by the late Mr. Hedges Eyre to the plaintiff, with reference to the Statute of Limitations (called Lord Tenterden’s Act); and I think, on the true construction of that letter, the plaintiff’s demands are not barred by the statute: it imports an engagement on the part of Mr. Eyre to pay to the plaintiff whatever sum was due to him, whenever he should be paid the amount of a certain mortgage debt, due to Mr. Eyre, and to enforce payment of which, a suit was at the very time pending in the Court of Equity Exchequer. That letter begins thus :—

“DEAR MAUNSELL—I have received your letter, and am concerned that I cannot comply with your wish of accepting the bill you enclosed me, as I could not be certain of having the means to discharge its contents at the time of payment. Should I receive the mortgage of Mr. Lynch, I will be then able to settle with you.”

Now if the word ‘settle’ signifies pay, there is little difficulty in holding it to apply to those debts about which there was nothing to settle, but to pay; and it is plain that that is its signification, for the means which he required, to enable him to settle, were the

(a) 1 Bing. 266.

means which the receipt of Mr. Lynch's mortgage would afford him, viz., money. Then the final passage of the letter bears the same construction—"You may be assured that I am anxious that our accounts should be arranged as soon as possible; nothing delays it but my having the means, which the Barna business if settled could enable me to do." What were the means that he required to arrange the account? the settlement of the Barna business, which would supply him with funds: it is clear then that to arrange, in that passage in the letter, means simply to pay, and must refer to those accounts in reference to which there was nothing to be arranged, except the payment. The words might fairly be held *prima facie* to extend to every debt existing between the parties; Mr. Eyre uses the word 'settled,' which could scarcely be applicable to any arrangement that did not include every debt. However, independently of that observation, there is quite sufficient in the letter to justify the argument of the plaintiff's Counsel. There is express reference to accounts in the last passage in the letter; and as three accounts appear in evidence, and no others, it must be concluded that the reference was to those three accounts. The only point that remains for consideration is the question of law that has been raised by the defendants' Counsel, and upon which much argument has been expended. It resolves itself into this narrow proposition—that where there is a promise to pay a debt, with a contingency annexed to it, and the contingency does not happen until a period of more than six years has elapsed from the time the promise was made, then the debt is barred by the statute. And that proposition is applied to the present case, as the contingency annexed to the promise, viz., the payment of the amount of the Barna mortgage debt, did not happen until after six years and upwards had elapsed from the date of the promise. That would appear to me to be in direct opposition to the authorities. In *Tanner v. Smart* the rule is laid down by Lord Tenterden—a rule that has ever since been followed in interpreting the statute—that there must be a promise to suit the promise stated in the declaration; or if there be a contingency annexed to the promise, it must be shown that the contingency has happened, and that then

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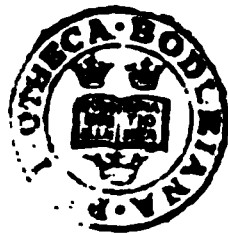
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the promise becomes absolute; and that appears to have been so laid down without assigning any limit within which the contingency must happen, in order to render the promise sufficient to support the declaration. *Hart v. Prendergast* is a case in which the principle propounded in *Tanner v. Smart* is followed. Parke, B. states:—
 “There is no doubt of the principle of law applicable to these cases
 “since the decision in *Tanner v. Smart*, namely, that the plaintiff
 “must either show an unqualified acknowledgment of the debt,
 “or if he show a promise coupled with a condition, he must show
 “performance of the condition; so as in either case to fit the pro-
 “mise laid in the declaration, which is a promise to pay on request.”
 There is also the case of *Waters v. The Earl of Thanet*, that has been relied on, and the decision in it appears to me to bear strongly upon, if not to decide, the very point. It is there decided that the statute began to run from the time the contingency happened. Lord Denman says:—“The period at which it (the right) is revived
 “is that of the fact taking place, and not of his becoming acquainted
 “with it.” Independently of cases, let us consider what are the principles that should govern us in cases like this. What is the nature of the promise, which the law requires, to take a case out of the operation of the statute? is it a contract, or is it merely an engagement or promise? If it be the former, it unquestionably requires a fresh consideration; but in none of the cases was it ever held to be any thing more than a mere promise, to support which nothing more is necessary than the existence of an antecedent debt; the past consideration is sufficient to support the promise, rebutting the presumption on which the statute is founded, that the debt had been satisfied, although it would not be a sufficient consideration to support an original contract. Promises then appear in such cases distinguishable from contracts. Let us see how the statute deals with the matter (and it is worthy of observation that the statute came after the case of *Tanner v. Smart*, which Lord Tenterden had himself decided). The words of the statute are, “no acknowledgement or promise” shall be sufficient, unless in writing. It does not say ‘contract;’ and the reason appears clear why it does not, when the distinction is considered between pro-

mises contemplated by the statute, and original contracts. This being the case, and the promise requiring so new consideration, the party making it will be subject to his original liability whenever the contingency arises, whether that be in six, ten or in fifty years. And as it is by virtue of the condition the promise is binding, so the condition must be fulfilled before there can be an absolute promise. A promise is binding by the statute, just as a promise with a consideration is binding at Common Law; but must be held to be binding then and then only, when the right revives. That is in perfect conformity with *Tanner v. Smart*; where the condition is performed the promise is absolute. It is clear to me, that the rule contended for by the defendants' Counsel does not exist; and I am confirmed in that opinion, from the fact that the question has never been raised.

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PENNEFATHER, B., concurred.



LEFROY, B.

I also concur in the judgment of the Court, and in the reasons upon which it is founded; but I desire to say a few words in reference to the position contended for by the Counsel for the defendants. They argued that if the condition was fulfilled within six years from the time of the promise being given, to which it was annexed, that it could be properly relied on to take the case out of the statute; but if it was not fulfilled until after six years from that period, that the statute had run against the promise before it became absolute, and therefore it was not available at all. Now it is conceded that an absolute promise, even after six years, will revive the right; and that appears to me to carry the case the entire way, for the authorities show that a promise with a condition becomes an absolute one on the condition being fulfilled. We may therefore consider this case in the same way as if an absolute promise had been made when the Barna mortgage debt was paid.

Judgment for the plaintiff.

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EDWARD WALSH and THOMAS MURPHY

v.

PATRICK DOWER.

Nov. 18.

A bond and warrant were executed contemporaneously with a marriage settlement, to which both the obligor and the plaintiffs were parties. It was provided by the settlement that the trustees should raise the amount on the bankruptcy, &c., of the obligor; and in case it should not be raised, that the bond and warrant should be delivered up to be cancelled; or if judgment entered thereon, that the same should be satisfied. Judgment had been entered and execution issued, and a month after the obligor became a bankrupt. Upon motion to set aside execution, &c., on behalf of assignees of bankrupt, on the ground that the defeasance con-

A conditional order had been obtained in this case, on the application of Michael Murphy, official assignee, and Thomas Gill, assignee of the estate and effects of the defendant, a bankrupt, to set aside the warrant of attorney and *fi. fa.*, on the ground that the said warrant of attorney was null and void under the 3 & 4 Vic. c. 105, s. 14, the defeasance not having been written thereon.

The circumstances of the case were as follows :—

The plaintiffs had obtained judgment for £4000 against the defendant, upon a bond and warrant of attorney, bearing date the 17th of January 1842, and executed contemporaneously with a deed of marriage settlement, entered into with the defendant and one Catherine Dunphy, and in which settlement the plaintiffs were the trustees. Execution had been issued on the judgment, and levied upon the goods of the defendant. The defendant was in the month following the execution declared bankrupt, and assignees were appointed. The warrant of attorney authorised the attorneys therein named to appear for the defendant at the suit of the plaintiffs as trustees of the settlement, and confess a judgment upon the bond of £4000 penal, with a release of errors.

The marriage settlement, after reciting the intended marriage, declared that the defendant, in consideration thereof, and of the sum of £2000, had passed his bond and warrant of attorney, conditioned for the payment of £2000, to the plaintiffs, in whom the interest in, and benefit of, the bond and warrant of attorney was declared to vest, upon trust that when and so soon as under and by virtue and in pursuance of any of the covenants, clauses and conditions therein-

tained in the settlement had not been written on the warrant of attorney, pursuant to the 3 & 4 Vic. c. 105, s. 14; *Held*, that the marriage settlement was not a defeasance within the meaning of the Act.

after contained, expressed and declared, the said trustees should raise and be paid the principal sum so as aforesaid secured by said bond and warrant of attorney ; then that the same should be expended for the support of the wife and children of the marriage ; and upon further trust that in case the said Patrick Dower, at any time after the solemnization of the marriage, should become bankrupt or insolvent, the trustees should, with all convenient speed, levy and raise the sum of £2000 out of all the real and personal property of the defendant, and apply it to the use of Catherine Dunphy and the issue of the marriage, under the several provisions and trusts therein contained ; and the settlement contained the following clause :—
 “ And in case the said sum shall not have been levied, that the said
 “ bond and warrant shall be void and of none effect, and shall be
 “ delivered up to the said Patrick Dower the defendant to be can-
 “ celled, and if judgment shall have been entered thereon, the same
 “ shall be satisfied on record.” No defeasance had been entered on the warrant of attorney.

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J. D. Fitzgerald, with *H. Smythe*, called on in support of the conditional order.

The question arises on the 14th section of the 3 & 4 Vic. c. 105, which requires “ that if such warrant of attorney shall be given, “ subject to any defeasance or condition, such defeasance or condi- “ tion shall be written on the same paper on which such warrant of “ attorney shall be written, before the time when the same, or a copy “ thereof respectively, shall be filed, otherwise such warrant of “ attorney shall be null and void to all intents and purposes.” In the case of *Conlan v. M'Anaspie (a)*, it was decided in this Court that a letter written by the obligee of a bond amounted to a defeasance. It is therefore unnecessary that the defeasance should be in any particular form or under seal. The Lord Chief Baron in that case says :—“ Many cases decide the well-known proposition, that a “ contract under seal cannot be put an end to at law by an instru- “ ment of a less solemn nature. But these cases only decide on “ the relation subsisting between parties upon rights and liabilities

(a) 10 Ir. Law Rep. 295.

M. T. 1851. *Exchequer.* “growing out of such contracts. They do not determine the definition of the term ‘defeasance.’ They do not decide that it is never to be used save in one strict and technical sense only. . . .
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DOWER. “To give it in this statute that confined import, would be in a great degree to nullify the Act of Parliament. . . . No doubt can exist that a contract in a separate writing, not under seal, intended and purporting to control a warrant of attorney, which is part of the same agreement and transaction, will do so.

“We ought so to construe the statute as to advance its purpose, and treat it as including in the term ‘defeasance’ any valid written contract by which the warrant of attorney can be controlled.”—
 [PENNEFATHER, B. The settlement does not appear to me to contain a defeasance within the meaning of the Act; but supposing it to contain one, it must be contended that the entire settlement should be transcribed.]—The true construction of the settlement is, that the amount of the bond was to be raised when the defendant should become bankrupt or insolvent, and not before; and it would have been sufficient to have stated that circumstance as the defeasance. A general statement would have been quite sufficient to carry out the object of the Act, which was intended for the protection of creditors. It is not necessary that there should be express words of relation between the instrument containing the defeasance and the instrument to which it is sought to apply it: *Trevett v. Aggas* (a).

Harris, with *H. Martley*, contra.

The true construction of the settlement is not that contended for, as the amount of the bond *could* have been raised at any time, but *must* have been raised by the trustees in the event of bankruptcy or insolvency. If this instrument was such a defeasance as was contemplated by the Act, the inconvenience would be very great. The Lord Chief Baron, in the case of *Conlan v. M'Anaspie*, already cited, states^d it to be his opinion that “the word defeasance, in this Act, must apply to that document, whatever it may be, which contains a contract qualifying or controlling the warrant of attorney.”

(a) Willes Rep. 107; S. C. Com. Rep. 568, nomine *Trevet v. Angus*.

The defeasance, therefore, is the settlement itself, and no general statement of its substance would be sufficient.—[PENNEFATHER, B. If the settlement contain such a defeasance as was contemplated by the Act, I do not think the provisions can be complied with, unless the entire settlement be set out, which I do not think was contemplated.]—Matters amounting to a defeasance are frequently contained in deeds or other instruments that cannot, for the purposes of this Act, be so treated. In *Barber v. Barber* (a), where a warrant of attorney was given to confess judgment absolutely for a sum certain, although it was understood between the parties to have been given to indemnify the plaintiff against his suretyship, for a smaller sum, it was held that the defeasance was not such as needed to be endorsed on the warrant of attorney, pursuant to the Rule of Court of Michaelmas Term, 42 G. 3.

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The 12th section of this Act recites that “injustice is frequently done to creditors by secret warrants of attorney to confess judgment, for securing the payment of money,” &c. The object of the Act is to prevent that injustice, and in this case injustice has been sufficiently provided against by the allusion to the settlement contained in the bond and warrant. This is not the proper mode of proceeding, for the Court will not set aside such solemn proceedings on motion. The 13th section provides a different remedy:—“And such assignee or assignees shall be entitled to recover back and receive for the use of the creditors of such bankrupt or prisoner all and every the moneys levied or effects seized under and by virtue of such judgment and execution.”

Martley, not called on.

H. Smythe, in reply.

This question is properly raised by motion.—[PIGOT, C.B. There can be no doubt that you are entitled to proceed by motion.]—The 14th section extends to warrants of attorney “given subject to any defeasance or condition,” and is not limited to those which contain a defeasance in themselves; and the 15th section, which provides

(a) 3 Taunt. 465.

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for the entry by the officer appointed for the purpose, not only of certain particulars of the warrant of attorney, but also of the defeasances or conditions in the warrant, shows that the attention of the Legislature was particularly directed to defeasances.

It is not sufficient to refer to the instrument containing the defeasance: *Morell v. Dubost and Sonnerat* (a).

PIGOT, C. B.

The terms of the marriage settlement are not very clear; but we cannot intend that any thing was designed to be done which has not been expressly done. Whatever may really have been the intention of the parties, it is clear that there is nothing in the deed to prevent the trustees from raising at the time they did the amount of the security; and the liability to have it raised at that period is not the less because it is imperative on the trustees to raise it on a certain event.

It is impossible to consider the deed of settlement as a defeasance of the kind contemplated by the Act of Parliament in question. The practical inconvenience of holding differently would be, as BARON PENNEFATHER has observed in the course of the argument, to require that the entire deed should be transcribed.

PENNEFATHER, B., and LEFROY, B., concurred.

Cause shown allowed, with costs.

(a) 3 Taunt. 235.

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WILLIAMS v. HUMPHREYS.*

Nov. 20.

M. BARRY, on behalf of the plaintiff, showed cause against a conditional order for judgment as in case of nonsuit.

In notice of motion to show cause against a conditional order for judgment as in case of nonsuit, it is sufficient compliance with the 114th and 239th New General Rules to describe the affidavit and other documents upon which the motion is grounded, without specifying the particular grounds.

Ross Moore, for the defendant, objected to the notice of showing cause, and contended that it was insufficient, as it did not specify the grounds on which the party relied, but merely referred to certain affidavits and other documents in support of his opposition to the conditional order. The 114th of the New General Orders prescribes, "that the mode of showing cause against conditional orders for judgment as in case of nonsuit shall be the same as is prescribed by Rule 239, in cases of showing cause against a conditional order to confirm an award." The notice of a party showing cause against a conditional order to confirm an award is required, by the 239th New General Rule, "to specify the grounds of objection to the award, and any affidavit or other documents he may intend to rely upon."—[PENNEFATHER, B. Is not a conditional order, in a case like this, governed by the same Rules as all other conditional orders?]—The case of a conditional order for judgment as in case of nonsuit is specifically provided for by the Rules I have mentioned, and therefore not to be governed by the 197th New General Rule, which provides generally for notices of motion to show cause against conditional orders.

M. Barry.

The Rule is sufficiently complied with by referring to the affidavits and documents relied on. It might be otherwise if any ground that did not appear on the documents were sought to be brought in aid of the motion. There would be the practical absurdity of having the documents relied on twice stated at length, if the Rules stated were to be construed as contended for by the defendant.

* RICHARDS, B., *absente*.

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PENNEFATHER, B.

Exchequer.

WILLIAMS

v.

HUMPHREYS.

The practical inconvenience would indeed be very great if parties were required to state specifically in their notices every ground upon which they rested their cases. The notice appears sufficient.

[The motion then having been gone into on the merits, it was ordered by the Court, and by consent, "that a *stet processus* be entered, without costs."]



ANONYMOUS.

Nov. 24.

Where any portion of a debt remains due, the officer should enter judgment, without any order of the Court for the purpose.

HAYES, on behalf of the plaintiff's attorney, moved that the officer be directed to enter judgment, under the circumstances following:—

The plaintiff, who resided in England, had received from the defendant the amount of a bill of exchange, part of the subject-matter of the action, but had not received the interest or costs of protest, which together made the sum of 11s. 1d.

Counsel submitted that, as a part of the debt still remained due, the judgment should have been entered by the officer without any application.

LEFROY, B.,* after consultation with the Clerk of Rules, stated that he was informed by the officer that, where any part of the debt remained due, the judgment should be entered without any order for the purpose. His Lordship added that it was unnecessary to make an order on the subject, but that an intimation would be made to the officer of the opinion of the Court.

* *Solus.*

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*(Common Pleas.)*1851.
June 13.1852.
Jan. 15, 17,

DEBT, upon three several bonds executed by the defendant to the plaintiff, as Secretary to the West of England Fire and Life Insurance Company. The declaration contained three counts.

To the third count, which was on a bond for £800, dated the 24th of January 1850, the defendant having craved oyer of the bond and condition of it, which was in the following terms:—

“Whereas the above-bounden John Busteed has been appointed
“agent for the Company at Tralee aforesaid, during their pleasure,
“and has been required to give the security of this present bond;
“now the condition of the above-written obligation is that if the
“above-bounden John Busteed shall, at all times whilst he shall con-
“tinue such agent of the said Company, or in any way act for or be
“engaged in the service of the said Company, or on their behalf,
“faithfully execute the duties of an agent to the said Company, and
“observe, perform, fulfil and keep the instructions, rules, orders and
“directions of the Board of Directors of the said Company for the
“time being, and shall not do or suffer any act, matter or thing to
“the prejudice or damage of the said Company, and if the said John

By the condition of a bond entered into between the defendant and the West of England Insurance Company, it was declared that if the defendant should at all times faithfully execute the duties of an agent to the Company, and should, from time to time thereafter, within one calendar month after he should have been thereto required by notice in writing, render a faithful account of, and faithfully pay and deliver to the said Company, at

their head office at E., all such sums of money, &c., as he had received or should receive, then the condition to be void.

Held, that the latter clauses controlled the former part of the condition, and that although the defendant would, in discharge of “the duties of an agent” appointed by a simple power of attorney, be bound to pay over all balances of money in his hands, on request, yet that under the terms of the condition of the present bond he was not bound to do so until after having received a month’s notice.

To a declaration upon the above bond, the defendant, having craved oyer of the bond and condition, which was granted, pleaded general performance; the plaintiff replied that the defendant, after the execution of the bond, received sums of money on account of the Company, amounting to £200, and that after having received them he voluntarily dispensed with the month’s notice required by the condition, and rendered an account to the Company of all moneys in his hands, showing himself in debt to the Company to the amount of £800. *Held*, on demurrer, that the plaintiff having given oyer of the condition, it must be taken to be, as well as the bond, under seal, and that the defendant could not by parol dispense with the terms of the condition of the bond.

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“ Busted, his heirs, executors and administrators, do and shall from
 “ time to time, and at all times hereafter, within one calendar month
 “ after he or they shall have been thereunto required, by notice in
 “ writing, served upon or left at the last usual known place of
 “ residence or abode of the said John Busted, render a faithful
 “ account of, and faithfully pay and deliver over to the said Com-
 “ pany at their head office in Exeter, or at such other place or to
 “ such person or persons, if any, as the Secretary of the said Com-
 “ pany for the time being shall direct, all such premiums, duties,
 “ sums of money, deeds, securities, policies, books, papers, letters,
 “ writings, receipts, forms and vouchers, goods, chattels and effects,
 “ which he the said John Busted hath already received or become
 “ possessed of, or which he, his executors or administrators, shall
 “ hereafter have held, receive or be intrusted with or become pos-
 “ sessed of as such agent of the said Company, or for or on account
 “ of the said Company, or which in any way concern or relate to the
 “ said Company, or any affairs, business or concerns of the said
 “ Company, and also give all such information and explanation as
 “ may from time to time be required by the Secretary of the said
 “ Company for the time being, then the above-written obligation to
 “ be void.” Then followed a declaration that the bond should extend
 to and include the Company, however constituted from time to time,
 and that the Board of Directors might make such arrangements with
 and grant such indulgence to the said John Busted as they might
 think proper, without any further consent by the parties to the bond.

The bond and condition being set out upon oyer, the defendant
 pleaded—secondly, that he did at all times faithfully execute the
 duties of an agent of the said Company, and did at all times ob-
 • serve, perform, fulfil and keep the instructions, rules, orders and
 directions of the Board of Directors of the said Company, and of
 the Secretary of the said Company for the time being, and did not
 do or suffer any act, matter or thing to the prejudice or damage of
 the said Company, and that he did from time to time and at all times,
 within one calendar month after he had been hitherto required, by
 notice in writing signed by the Secretary for the time being of the
 said Company, served upon, &c., render a faithful account of and

faithfully pay and deliver over to the said Company, at their head office in Exeter, all such premiums, duties, &c., which he the said defendant had received or become possessed of, as such agent, for or on account of the said Company, or which in any way concerned or related to the said Company, in any affairs, business or concerns of the said Company, and did also give all such information and explanation as from time to time was required by the Secretary of the said Company for the time being.—*Verification.*

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Replication—That the defendant, for a long time before the sealing of the said writing obligatory, to wit from, &c., had received divers large sums of money, amounting in the whole to £600, and that after having received the said sum of money, and after the signing and sealing of the said writing obligatory, the defendant was the agent of the Company, and in that capacity received other sums of money on account of the Company, amounting to £200. “And that afterwards, and after the receipt of the said several “sums of money by the defendant as such agent as aforesaid, and “while he was possessed of the same, as last aforesaid, to wit, on “&c., at &c., he the said defendant, of his own accord, did then and “there dispense with the said one calendar month’s notice in the said “condition to the said writing obligatory in the said count men- “tioned, and did then and there of his own accord render and “deliver to the said Company an account in writing of all moneys “had and received by him the said defendant, for and on account of “the said Company previous to, and which he had in his possession “at the time of, the execution of the said writing obligatory, in the “said third count mentioned, and which he has received since the “execution of the same, as such agent as aforesaid: and the said “plaintiff avers, that the said account so furnished by the defendant, “as last aforesaid, was then and there stated and settled by and “between the said Company and the said defendant as such agent “as aforesaid, and upon that account the said defendant was found “to be indebted to the said Company in a large sum of money, to “wit, the sum of £800, in respect of the said several moneys so had “and received by him, as last aforesaid. Whereby, and by reason “whereof, he the said defendant then and there became and was

H. T. 1852. "liable to pay to the said Company the said sum of £800, under
Common Pleas. "and by virtue of the said writing obligatory in the said third
 LEWIS "count mentioned."—*Breach.*
 v.

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Special demurrer, on the ground that the replication did not traverse any material averment in the plea, and that it did not traverse, except argumentatively, that the defendant had accounted; and that it amounted to a count on an account stated, and that it tendered several issues, namely, the receipt of money, the fact of the notice having been dispensed with, the settlement of an account, and that a balance appeared due upon that settlement, and that it did not show that the notice required by the bond had been served.

Joinder in demurrer.

Robert Ferguson (with whom was *Fitzgibbon*), for the demurrer.

The replication is objectionable, for the reasons assigned. It does not show that the notice required by the condition of the bond was served on the defendant; and the excuse alleged in the plea, for the non-service of it, is not sufficient. It only extends to the defendant's duty to account, and not to his obligation to pay and deliver over to the Company the sums of money, &c., which should be in his hands. The bond is not forfeited until the defendant neglected to comply with the notice: *Peck v. Methold* (a); *Carter v. Ring* (b); *Topham v. Braddick* (c); *Heard v. Wadham* (d).

But even admitting the excuse to be sufficient in form, the defendant could not by parol dispense with the terms of a condition under seal: *Roe d. Gregson v. Harrison* (e); *Rippinghall v. Lloyd* (f); *Gwynne v. Davy* (g); *West v. Blakeway* (h). The following authorities were also referred to: *Com. Dig.*, tit. *Condition*, L, 8; *Little v. Holland* (i); *Brown v. Goodman* (k); *Brooks v. Stuart* (l).

(a) 3 Bulst. 297.

(b) 3 Camp. 459.

(c) 1 Taunt. 571.

(d) 1 East, 619.

(e) 2 T. R. 425.

(f) 5 B. & Ad. 742.

(g) 2 Scott, N. R. 29.

(h) 3 Scott, N. R. 99.

(i) 3 T. R. 590.

(k) Ibid, in notis.

(l) 9 Ad. & El. 854.

Richard Armstrong (with whom *J. D. Fitzgerald*), for the plaintiff. H. T. 1852.
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The cases of covenants are distinguishable. It is not necessary that the condition to the bond should be under seal: *Vin. Ab. tit. Condition*, M. C.; and there is no averment in the present case that the condition of the bond was under seal; and if not, it may be waived or abandoned by a parol agreement: *Goss v. Lord Nugent* (a).—[MONAHAN, C. J. Would you be bound to give oyer of the condition if it was not under seal?—As the deed is set out upon oyer, there is no attestation to the condition. If there were, it should have been set out: *Jennis v. Harridge* (b); *Longmore v. Rogers* (c). The defendant by his plea avers a general performance of all the conditions of the bond, it is therefore sufficient for us to show a breach of *any one*. One of these is, that the defendant will faithfully discharge the duties of an agent, and in compliance with that he would be bound to pay over to his principal all money in his hands. The condition which stipulates for a month's notice only applies to the case of a final account, and not to the ordinary transactions between the Company and their agent. The latter might be receiving money every day, yet the notice could only apply to moneys which were received before it was served. In *Stothert v. Goodfellow* (d), it was held that a condition that the defendant should serve as agent without embezzling the money of his principal was not vitiated by a subsequent condition that he should account weekly, or oftener, if required by notice under the hand of the plaintiff.—[MONAHAN, C. J. In that case there was an express breach of the first branch of the condition: would the replication be a good assignment of the breach of the condition of the present bond?]
—All that the plaintiff would be bound to show, in case issue were joined, would be such a state of facts as would amount to a breach of the first term of the condition. With regard to there being no notice alleged in the replication, the case of *Levins v. Randall* (e) shows that the defendant could not rejoin the want of notice; and if

(a) 5 B. & Ad. 58.

(b) 1 Saund. 1.

(c) Willes, 288.

(d) 1 Nev. & M. 202.

(e) 12 Mod. 413.

H. T. 1852. *Common Pleas* the defendant cannot rejoin, he cannot demur for want of the allegation in the replication. The following cases and authorities were cited: *Vin. Abr.*, M. C., *pl.* 3; N. C., *pl.* 5; *Chapman v. Chapman* (a).
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 v.
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Fitzgibbon, in reply.

The defendant having pleaded general performance, the plaintiff was bound by his replication to assign the particular acts of default of which he complained; and those branches of the condition on which no breaches are assigned must be considered to have been performed. The clause as to accounting after a month's notice must be construed as if taken out of the general duties of an agent. The words from "time to time" show that the proviso as to a month's notice does not apply to the case of a final accounting. Could it be contended that on issue joined on this replication the plaintiff could prove some other breach of the defendant's duty as agent? The case of *Stothert v. Goodfellow* (b) is distinguishable. The notice in that case was only applicable to the accounting, and not to the embezzling, and the case there arose in arrest of judgment.

Cur. ad. vult.

1852.
 Jan. 17.

The LORD CHIEF JUSTICE MONAHAN now delivered the judgment of the Court.

After stating the pleadings, his Lordship proceeded:—In the first place, it was argued on behalf of the plaintiff that it does not appear upon these pleadings that the condition was part of the sealed instrument, and that it therefore might be waived or varied by parol; but we are of opinion that that objection cannot prevail.

In the first place, the defendant has craved oyer not only of the bond, but of the condition to it, and the plaintiff has granted it, which he would not be bound to do unless the condition of the bond, as well as the bond itself, was under seal; and in the next

(a) *Cro. Car.* 76.

(b) 1 N. & M. 202.

place, from the terms in which the condition is described, it is evident that it must be taken to be part of the sealed instrument, for the bond is described as the "above bond;" and the defendant as the "above-bounden John Busteed." We are therefore of opinion that upon this record we must take it that both the bond and condition are under seal. But then it was argued on behalf of the plaintiff that although under seal, yet as the condition by which the defendant claims to be entitled to a month's notice, before being bound to pay over to the Company the balance of money which should from time to time be in his hands, was one which was introduced for the benefit of the defendant himself, it was competent for him to dispense with it: and accordingly the replication avers that the defendant, after the receipt of the money, voluntarily dispensed with the one calendar month's notice required to be given by the terms of the condition of the bond; in other words, that though under the terms of an instrument under seal the defendant was not liable to pay unless after receiving a month's notice, yet that by voluntarily dispensing with that condition, he becomes liable to pay not the balance of money then in his hand, but the full penalty of the bond itself. Nothing is better established than that contracts under seal cannot be varied by an agreement which is not of the same character. And it will be found that the cases which have been cited in the course of the argument for the purpose of showing that a party may waive a condition, although under seal, are cases in which the obligee has prevented the obligor from performing the condition, in some cases rendering it impossible to be performed; and the Courts have in such cases held that he could not take the advantage of his own default. But such cases as these have no application to the present case, when we are in fact required to alter the contract between the parties; for this is an agreement under seal to pay the money within one month after notice in writing; and it would be altering the agreement of parties to hold the money to be recoverable without such notice.

But then it is argued that, although the defendant neglects to pay over the money without notice may not be a breach of the latter branch of the condition, it is a breach of that part of the condition

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by which the defendant undertakes faithfully to execute the duties of an agent. We quite admit that in ordinary cases it is the duty of an agent to pay over to his principal all balances of money which he may have in his hands from time to time ; and in this case, if the defendant had been appointed agent by any ordinary power of attorney not containing special clauses, and not by an instrument containing special provision as to the events under which he should be bound to account for and pay over the money in his hands, that argument might apply, although we are not deciding that question in the present case: all that we now decide in the present action is, that under the terms of this bond the defendant, by neglecting to pay over money on request, did not commit a breach of a condition of the bond upon which this action has been brought, and that the penal sum cannot be recovered, on proof that the defendant had a balance of money in his hands, which he refused to pay over to the Company on request. The only other objection was to the pleading; Mr. *Fitzgerald* contending, on the authority of the case of *Chapman v. Chapman* (a), that the defendant, having pleaded performance generally, cannot now be allowed to rely on the want of notice. We do not think that case applies to the present. In that case the defendant pleaded he had performed all the covenants, payments, &c., contained in the lease ; that was held to amount to an allegation of actual payment of the rent reserved ; and his relying on want of a demand would have been a departure : but in the present case the substance of the plea is, that whenever he was required, as provided by the bond, he paid over the money, &c. ; and it is quite possible he may have been required, and that he did make the payments when so required ; but it is no departure for him to contend that he was never required to pay over the particular sum now in his hands.

On the whole, therefore, the demurrer must be allowed, and judgment for the defendant as to the third count.

Demurrer allowed.

(a) Cro. Car. 76.

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Common Pleas.

Executor of MARKEY

v.

The Heir and Terretenants of PATRICK DOWDELL.

Jan. 14.

J. D. FITZGERALD, on behalf of the heir, Laurence Charles Dowdell, moved that the return of the Sheriff to the writ of *scire facias* in this cause might, as regards the said Laurence Charles Dowdell, be set aside with costs, on the ground that a copy of the writ of *scire facias* was not served on the said Laurence Charles Dowdell, as required by the 171st General Order.

A *scire facias* having issued to revive a judgment against the heir and terretenants of A, the Sheriff served B the heir with a notice requiring him to appear on the return of the writ, and show cause according to its tenor, but neglected to serve any copy of the *scire facias* pursuant to the 171st General Order. *Held*, under these circumstances, that the Court would on motion set aside the Sheriff's return of *scire feci*, more particularly as in case a new writ should issue, the judgment would be barred by the Statute of Limitations.

The judgment was originally entered against Patrick Dowdell, the father of L. C. Dowdell, as of Easter Term, 55 G. 3, and subsequently revived as of Michaelmas Term 1831. The *scire facias* in the present case issued in the present year, returnable on the 18th of December 1851. The Sheriff returned *scire feci*, but, as was sworn by the heir of the conuzor, neglected to serve a copy of the *scire facias* upon him pursuant to the 171st General Order; and merely served a note of the purport of the *scire facias*, calling on him to appear on the return of the writ. A cross notice of motion was served by the plaintiff for liberty to vacate the rule for judgment, and that the writ of *scire facias* might be taken off the file, and the return expunged, and the writ amended by making it returnable on the 1st of April 1852.

In support of the motion it was argued that, although as a general rule the Court would not try the validity of a Sheriff's return upon motion, yet that where the return was manifestly false, as in the present case, in which it was sworn and not denied that no copy of the writ had been served, and there could therefore be no question of fact for a jury to try, the Court would decide the validity of the return in a summary manner.—[MONAHAN, C. J. The difficulty here is that the plaintiff has performed his duty in every respect. If the Sheriff has not served the heir, he can have an action against

H. T. 1852. him for a false return ; but can you prejudice the right of a third
Common Pleas. party who is not in default ?]—In *O'Meara v. Magrath* (a) the
 MARKEY Court intimated an opinion that if the facts were not denied, they
 v. would on motion compel the Sheriff to amend his return.
 DOWDELL.

Macdonagh and Richard Armstrong, contra.

It has been frequently decided that the truth of the facts stated in the Sheriff's return will not be tried upon motion: *Barr v. Satchwell* (b) ; *Hunt v. Coxe* (c) ; *Goubot v. De Crouy* (d) ; *Barber v. Mitchell* (e). There is no pretence that any collusion exists between the plaintiff and the Sheriff. If the rule be as contended for by the plaintiff, the slightest variation in the copy of the *scire facias* served would entitle the defendant to set aside the judgment. The following authorities were cited: 1 *Archbold's Prac.*, by *Chitty*, 7th ed., p. 556; 2 *Tidd's Prac.*, p. 1124.

Fitzgerald, in reply.

The Sheriff is the agent of the plaintiff in serving the writ ; formerly the writ was general, and the Sheriff returned the names of the heir and terretenants. Now under O'Neill's Act the heir and terretenants are named. It must be taken that the plaintiff omitted to name the heir.

MONAHAN, C. J.

This is a case of some importance ; but as all the cases which seem to bear upon the point have been cited, we do not think that we could derive any advantage by taking further time to consider our judgment. We are all of opinion that this motion must be refused. According to the terms of the 171st General Rule, it was no doubt, strictly speaking, the duty of the Sheriff to give a copy of the *scire facias* to the defendant, and not merely a notice of the *scire facias* having issued ; but the Sheriff is a public officer, not selected

(a) Ridg. Lap. & Sch. 176.

(b) 2 Str. 813.

(c) 3 Bur. 1360.

(d) 2 Dow. P. C. 86.

(e) Ibid, 574.

by the plaintiff; and the plaintiff has done every thing which it was in his power to do; he has got a return from a public officer, whose duty it is to have the defendant served with a writ, stating that he has served the heir and terretenants of the conuzor in the usual manner; and though the defendant (the heir) has notice of the proceedings, and still an opportunity of pleading to the *scire facias*, he seeks to set aside the return in order to oblige plaintiff to issue a new writ to let in the defence of the Statute of Limitations. It cannot be denied that if the Sheriff has made a false return, and that the party is thereby prejudiced, he may maintain an action against him; but we think it would be contrary to the settled practice, and to the authority of the case of *Barr v. Satchwell*, to set aside the return itself upon motion. We do not mean to lay down a rule which will prevent us setting aside a return and judgment founded thereon, if the defendant has had no notice, and there is any question to be tried between the parties. Our decision is, that we will not set aside the Sheriff's return upon motion by a party who alleges that, though he has had notice, he has not been served with a copy of the *scire facias*, more especially in a case like the present, in which, if a new *scire facias* be sued out, the judgment would be barred by the Statute of Limitations.

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~~Common Pleas.~~
 MARKET
 v.
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TORRENS, J.

I wish to state that we refuse this motion on the particular facts of this case, and that we do not lay down any general rule on the subject.

JACKSON, J., concurred.

Motion refused, with costs.

H. T. 1852.
Common Pleas.

MICHAEL CHESTER v. ELEANOR BEARY.

Jan. 22, 23, 24.

By the terms of a lease, a right to re-enter upon the lands demised was reserved to the lessor in case any half-yearly gale of the reserved rent or any part thereof should be in arrear for twenty-one days after any of the periods appointed for payment. At the time when the ejectment was brought, one half-year's rent, and also fractions of previous gales, making, with the former, a full year's rent in amount, as reserved by the lease, were due. *Held*, under those circumstances, that an ejectment for non-payment of rent under the statutes 4 G. 1, c. 5, and 8 G. 1, c. 2, was maintainable; that it was not necessary that the right of re-entry should be co-extensive with the rent due, or that the arrear

EJECTMENT for non-payment of rent.—The case was tried before the Lord Chief Baron, at the last Summer Assizes for the county of Limerick, when the following facts appeared in evidence:—

On the part of the plaintiff a lease was proved, dated the 7th of March 1840, from Lord Stradbroke to the defendant, of the lands of Bilboa, containing 75A. 3R. 38P., for the term of twenty years, at a rent of £90, payable on the 1st of May and 1st of November in each year, with a clause of re-entry in case any half-yearly gale of the said rent should be in arrear for twenty-one days after any of the gale days. Proof was also given by the land-agent of the plaintiff of receipt of rent from the defendant under this lease, and that a sum of £170. 10s. was due on account of the rent up to the 1st of May 1851. On the part of the defendant, payments of various sums at different times, from the month of April 1849 to the month of April 1850, were proved, amounting in the whole to a sum of £148. 12s. 3d., it being admitted that all rent up to November 1848 had been paid, with an excess of £5 to be carried to the account of the next gale. It also appeared that a sum of £49. 10s. had been realised in the month of March 1851 by a distress on the defendant's goods; and it was proved by the evidence of the defendant's son, that in a conversation which he had with the plaintiff in the month of January 1851, on the subject of an abatement of the rent, the latter agreed to reduce the rent to a pound an acre; and the witness having complained that the defendant had made payments for which she had not received credit, that the plaintiff said he would forgive all rent up to November 1849, and that any money paid since November

of rent required by the statute should have accrued in a continuous period previous to the commencement of the action; and that as the plaintiff was under the lease entitled to re-enter for any half-yearly gale, and a sum equal to one year's rent as reserved by the lease was due to him, he was entitled to recover possession.

1849 should be allowed to go in discharge of the rent of the year 1850. On this evidence the defendant insisted that there was not a year's rent due when the ejectment was brought.

After the close of the defendant's case, the Lord Chief Baron, with the assent of both parties, sent a collateral issue to the jury, whether the plaintiff had entered into the alleged agreement for the abatement of the future rent and the appropriation of the payments? and the jury having found in the affirmative, his Lordship directed a verdict for the plaintiff, reserving liberty to the defendant to move to enter a verdict for him if the Court should be of opinion that, on the finding of the jury, his Lordship should have so directed. The other facts of the case appear sufficiently from the judgment of the LORD CHIEF JUSTICE.

A conditional order having been obtained, in Michaelmas Term 1851, to enter a verdict for the defendant—

Deasy, with whom was *J. F. Townsend*, now showed cause.

The plaintiff is entitled to retain the verdict in the present case. First, as regards the agreement for the forgiveness of the arrears of rent, it was given without consideration, and could not therefore discharge the defendant's liability under the lease; it was, moreover, entered into after the defendant had committed a breach of the covenant, and being by parol, could not operate as a discharge of the debt. After breach, a contract can only be discharged by something which amounts to accord and satisfaction. Secondly, the agreement as to the appropriation was the result of the alleged agreement for the forgiveness of the arrears, and as the former is void for want of a consideration, the agreement must fail *in toto*. But thirdly, assuming the agreement for the appropriation of the future payments after the month of November 1849 to the rent of the year 1850 to be valid, there will still remain a year's rent due at the time when the ejectment was brought, inasmuch as the arrears due previous to November 1849 are still unsatisfied, and they, together with the half year's rent due in May 1851, will make up a full year's rent as reserved by the lease.

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J. D. Fitzgerald and Heron, for the defendant.

A creditor to whom distinct debts are due may appropriate payments made to him generally to either account, and this may be done either at the time, or (with the consent of the debtor) at any time afterwards: *Chitty on Contracts*, 3rd ed.; *Story on Contracts*, p. 364. In the present case, the agreement entered into between the plaintiff and defendant in January 1851 must therefore be considered binding, so far as the appropriation of the payments made by the tenants after the month of November 1849; and in that view we submit that the present ejectment cannot be maintained. To support an ejectment for non-payment of rent under the 4 G. 1, c. 5, and the subsequent statutes, it must be proved—firstly, that a year's rent reserved by the lease, or other instrument required by the statutes, is due; and secondly, that the landlord or lessor is entitled to re-enter in respect of *that arrear*. That the statute must receive this construction, namely, that the right of re-entry must be co-extensive with the rent due, is apparent, from a consideration of the terms of the 11 *Anne*, s. 2, which first creates the statutable ejectment for non-payment of rent, and which requires that more than one half year's rent shall be in arrear, and that the landlord or lessor to whom the same is due should have a right to enter in respect *thereof*. The subsequent Acts extending this statutable remedy, viz., 4 G. 1, c. 5, and the 8 G. 1, c. 2, do not contain any express mention of the right of re-entry; but it has been always held that the requisites of the statute 11 *Anne*, c. 2, are imported into them: it must, therefore, be held that under these statutes the right of re-entry must be in respect of the rent due, and that the year's rent required by them to be in arrear before the ejectment is brought must be a continuous year's rent due for the period immediately preceding the commencement of the action. On these principles it is plain that the present ejectment cannot be sustained. By the distress levied in January 1851, the plaintiff waived the right of re-entry, which he had in respect of the rent due in and previous to the month of November 1849. A forfeiture for condition broken may be waived on the part of the person entitled to the benefit of it, by acts *in pais*, as by receipt of rent:

Arnsbey v. Woodward (a); *Doe d. Nash v. Birch* (b); *Taylor on Evidence*, p. 568. And even after judgment in ejectment for non-payment of rent, and execution executed, it has been held that the forfeiture may be waived: *Lessee Malone v. Malone* (c). The following authorities were referred to in the course of the argument: *Alden v. Blague* (d); *Bristow v. Eastman* (e); *Alner v. George* (f); *Bramston v. Robins* (g); *Simson v. Ingham* (h); *Doe d. Knight v. Rowe* (i); *Vin. Abr.*, tit. *Condition*, M. C., pl. 5, 44; *Com. Dig.*, *Hammond's* ed., tit. *Pleader*, p. 79; *Roscoe on Evidence*, 7th ed., p. 73; *Furlong's Landlord and Tenant*, p. 1086.

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Townsend, in reply.

Cur. ad. vult.

MONAHAN, C. J.

This was an ejectment for non-payment of rent, tried before the Lord Chief Baron at the last Assizes for the county of Limerick. The plaintiff claims a sum of £170. 10s. as due for arrears of rent under a lease dated the 7th of March 1840, for twenty years, at a rent of £90, payable on the 1st of May and the 1st of November in every year; and he alleges that the arrears due up to the 1st of May 1851 amount to that sum. The defendant alleged that by reason of an agreement between the plaintiff and him certain credits, which were proved, ought to be appropriated to the rent which accrued after the 1st of November 1849, and that if those credits were so appropriated, less than a year's rent was due when the ejectment was brought. The jury, upon a collateral issue sent to them, with the consent of both parties, found that there was such an agreement (as the defendant alleged), and his Lordship reports that he was not satisfied with their finding, which he thinks was warranted by the evidence; but notwithstanding the finding, he directed a verdict for

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(a) 6 B. & C. 519; S. C. 9 D. & R. 536. (b) 1 M. & W. 402.

(c) Note to *Nesbitt v. Tredennick*, 1 B. & B. 32.

(d) Cro. Jac. 99.

(e) 1 Esp. N. P. C. 171.

(f) 1 Camp. 392.

(g) 4 Bing. 11.

(h) 2 B. & C. 65.

(i) Ry. & Moo. 343.

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the plaintiff, on the ground that the agreement being by parol did not discharge the liability under the lease. The demise was laid on the 16th of May 1851, and it is conceded that at that time the full half year's rent due on the 1st of May was unpaid, and that under the terms of the lease the plaintiff had an immediate right of re-entry in respect of that half-year's rent. The allegation in respect to the agreement was this :—The defendant complained that certain payments which she had made to Mr. Coates, the plaintiff's former agent, had not been credited to her, and that the plaintiff thereupon agreed that all rent due up to November 1849 should be forgiven, and that the payments made since November 1849, instead of being applied in discharge of the previous rent, should be applied to the payment of the rent which became due in May 1850, and to the subsequently accruing gales ; and it was further agreed that the rent should be reduced from £1. 5s. to £1 an acre. It was contended by the plaintiff that this was a valid and binding agreement, and accordingly that a full year's rent was not due when the ejectment was brought. Now if this were a valid and binding agreement, and if all arrears previous to November 1849 were forgiven, and the subsequent payments are to be applied to the rent which became due after that period, there certainly would not be a full year's rent due at the time when the ejectment was brought. But it was not contended before us that a year's rent, however made up, was not due, and in some way or other recoverable by the landlord ; but the argument was that the alleged agreement, though not binding as to the reduction, yet it was as to the appropriation of all payments made subsequent to the month of November 1849, and that all payments which had been made subsequent to that period, including the sum levied under the distress, should be applied to the discharge of the rent which became due in the year 1850. It is not necessary for us to decide whether that argument can be sustained, or whether this was not an entire agreement, and whether the agreement as to the appropriation was not the consequence of the forgiveness of the previous arrears ; for even assuming the agreement to be valid and binding, so far as it related to the appropriation, the effect would be that the entire rent of one half year ending in May 1851 was

due and unpaid at the time the ejectment was brought: and therefore, according to the express agreement of the parties contained in the lease, the plaintiff had a Common Law right to re-enter. It also appears that there were portions of previous gales still due, which, if added to that due in May 1851, left more than a full year's rent due when the ejectment was brought. The question therefore which we have to decide is, whether an ejectment for non-payment of rent can be sustained where the year's rent required by the Ejectment Statutes does not consist of one unbroken year's rent due on the gale day previous to bringing the ejectment, but is made up of one full half-year's rent, and of fractions of several previous gales, but in all amounting in moneys numbered to one year's rent as reserved by the lease? I believe this is the first occasion on which the question has arisen, and it is not difficult to account for its not having arisen before, as it generally happens that the arrear of rent due when the ejectment is brought is for the period immediately preceding the commencement of the action. We must therefore, in the absence of authority, decide the case on the construction of the statutes.

The first Ejectment Statute, and that which imports the necessity for a right of re-entry into all the succeeding statutes, is the 11 of *Anne*, c. 11, and by the 2nd section it is enacted "That in all cases
 "between landlord and tenant, as often as it shall happen that more
 "than one-half year's rent shall be in arrear, and the landlord or
 "lessor to whom the same is due hath right by law to re-enter for
 "the non-payment, such landlord or lessor shall and may, without
 "any formal demand or re-entry, serve a summons in ejectment for
 "the recovery of the demised premises, which summons in ejectment
 "shall stand in the place and stead of a demand and re-entry;" and then it goes on to state "That in case of judgment against the
 "casual ejector, or nonsuit for not confessing lease, entry and ouster,
 "if it shall be made to appear to the Court where the suit is depend-
 "ing, by affidavit, or proved upon the trial in case the defendant
 "appears, that more than a half year's rent was due before the eject-
 "ment was served, and that no sufficient distress was to be found on
 "the demised premises countervailing the arrears then due, and that

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“the lessor or lessors in ejectment had power to re-enter; then and
“in every such case the lessor or lessors in ejectment shall recover
“judgment and execution in the same manner as if the rent had
“been legally demanded and re-entry made.” Now it is quite clear
that, in order to maintain an ejectment under that statute, in cases
where there is no sufficient distress on the lands, it is only necessary
that more than one-half year’s rent should be due, and that the land-
lord should have a power to re-enter; but it is clear that if a landlord
accepted a portion of a gale, he would forfeit his right of re-entry at
Common Law in relation to that particular gale: it therefore cannot
have been intended by the statute that the right of re-entry should
be in every respect co-extensive with the rent due; all that it re-
quired was, that it should exist as to some portion of the rent in
arrear, not as to all the component parts of which that arrear was
composed. That statute, however, only applies in cases where there
is not sufficient distress to countervail the arrear of rent, and has no
reference to the present case. The next statute, the 4 G. 1, c. 5,
enacts that as often as it shall appear that more than one year’s rent
shall be due and in arrear to any landlord or lessor, though there
be distress sufficient on the land to answer the rent in arrear, such
landlord or lessor may serve a summons in ejectment for recovery
of the demised premises; and in case of judgment against the casual
ejector, or nonsuit for not confessing lease, entry and ouster, if it shall
be made appear to the Court where such suit is depending, by
affidavit of such landlord or lessor, or his agent, or it shall be made
appear on the trial, in case the defendant appears, that more than one
year’s rent was due before such summons was served, then and in
every such case the landlord or lessor, or his lessee in ejectment,
shall recover judgment and have execution thereon. This statute
does not in terms require the existence of a right of re-entry; but by
an equitable construction, the right of re-entry rendered necessary
by the former statute is imported into this; and therefore the obser-
vation before made with reference to ejectments under the statute of
Anne applies to this case, and that in case any fraction of a gale had
remained unpaid, together with a full year’s rent, the ejectment for
non-payment of rent could be sustained, though the right of entry

existed in relation only to the year's rent, and did not exist so far as the portion of the previous gale was concerned. It is plain therefore that all that is required under either of these statutes is, that the landlord should have one right of re-entry in respect of some portion of the rent which is due. The other statute, namely, the 8 G. 1, c. 2, alters the former merely by rendering one full year's rent sufficient to maintain the ejectment, but does not in my opinion make any change as to what the component parts of such amount must consist of. It therefore appears to me that all that is required by these several statutes, in order to enable a landlord to maintain an ejectment for non-payment of rent, is, that he should have a right of re-entry in respect of some portion of the rent due at the time of bringing the ejectment, and that there should be a year's rent due at that time; but that it is not necessary that it should consist of rent due for one unbroken year, and that it is sufficient if it consists of a portion of a gale which, added to former arrears, makes up a year's rent.

The cause shown must therefore be allowed, with costs.

TORRENS, J., concurred.

JACKSON, J.

This being a case novel in its circumstances, and brought forward upon novel grounds, I wish to make a few observations relative to the legislation connected with this question. In order to maintain an ejectment for non-payment of rent, under the statutes in force in this country, it is necessary to establish two facts; firstly, that there is the amount of rent due which is required by the statutes; and secondly, that the landlord has a right to re-enter at the time the action is brought. It has been frequently decided that these statutes are all to be construed as one code, and it is of importance that this should be borne in mind in determining the interpretation which is to be given to any terms which may happen to occur in any particular statute, more particularly as great stress has in the course of the argument been laid upon the language of some of these statutes. Mr. *Fitzgerald* has contended that, from the terms which occur in some of these enactments, we must conclude that an ejectment for non-payment of rent cannot be maintained where the arrear

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Cause allowed.

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CASE, for an illegal distress. The declaration contained also a count in trover for the conversion of the goods seized.

Pleas—Not guilty, and several special pleas, on which no question arose.

At the trial, before Mr. Serjeant O'Brien, at the Kilkenny Spring Assizes 1850, it appeared that the defendant's agent had on the 28th of August 1849 distrained goods of the plaintiff, consisting of some wheat, hay and a bull, for a half-year's rent (£54), due on the 25th of March preceding. That upon that occasion the plaintiff agreed in writing with the defendant that he should thresh out the wheat and make the most of it, and of the other articles, for the benefit of the plaintiff, to defray the arrear of rent. That the wheat was accordingly threshed and sold pursuant to this agreement, and realised £23 over and above expenses, and that the bull and hay (being of the value of about £13) were, at the request of the plaintiff, not sold. It also appeared that there were other goods on the premises which might have been, but were not, seized.

On the 21st of September following, the defendant, by his bailiff, distrained a second time for the balance of the same half-year's rent remaining due; but the plaintiff having replevied, and the defendant having ascertained that his notice of distress on this occasion was defective in not containing the signature or residence of the party distraining, he (the defendant) served the following notice on the plaintiff:—

“SIR—Take notice, that I do not intend to proceed on the distress made for rent on the 21st of September instant; and I send you the sum of £1. 6s. as and for the costs you were put to in issuing a replevin, although I am advised you are irregular in issuing same.

“Dated this 27th day of September 1849.

“To Patrick Clooney.”

(Signed) “THOMAS WATSON.”

Trover lies by a tenant for a second distress by a landlord, who has omitted to distrain all the goods available on the premises on the occasion of the first distress. Where the notice of distress is defective under 9 & 10 Vic. c. 111, and the tenant replevies, the landlord may treat this as an election by the tenant to avoid the distress, and may distrain a second time. An exception cannot be taken, founded on a new case not opened until after the cases of both plaintiff and defendant have closed.

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The defendant then on the same day distrained a third time, and for this distress the action was brought. The proceedings on the trial of the civil-bill replevin on the 16th of October were also proved for the plaintiff, and that on that occasion the plaintiff had not relied on any irregularity in the notice of distress.

The defendant's case having closed, Counsel for the plaintiff called on the learned Judge to leave to the jury the following questions:—

First, whether the plaintiff had ever relied on any irregularity in the said notice of distress of the 21st of September? and if not, then to tell the jury that the defendant had no right to rely on such irregularity in justification of the distress of the 27th of September, and that they should find for the plaintiff on the first count; which his Lordship refused to do, and expressed his opinion to be that the distress of the 21st of September did not preclude the defendant from making the subsequent distress on the 27th of September.

Secondly, to leave to the jury whether the plaintiff treated the distress of the 21st of September as valid, and had issued the said replevin only to try the amount then due on foot of the rent claimed? and if so, then that the defendant could not abandon that distress, and make the distress of the 27th of September, and that they should therefore find for the plaintiff on the first count; which his Lordship refused to do, and expressed his opinion that whatever might have been the intention of the plaintiff in issuing the replevin, the distress of the 21st of September did not preclude the defendant from making a distress on the 27th.

Thirdly, to tell the jury that if, at the time of the distress of the 28th of August, the defendant could have distrained upon the premises goods sufficient to satisfy the whole rent due, and if they were of opinion that the subsequent acts of the parties amounted to a waiver of the irregularity in the notice of the distress of the 28th of August, that then the subsequent distress of the 27th of September for any part of the same rent was unlawful, and that they should therefore find for the plaintiff on the second count; which his Lordship declined to do, but told the jury that if they believed the evidence given on behalf of the defendant as to the acts and dealings of the plaintiff relative to the distress seized on the 28th of August, and

as to the disposal of said distress, that then the distress of the 28th August did not preclude the defendant from making a subsequent distress on the 27th of September.

Fourthly, to tell the jury that the agreement of the 4th of September was not such an abandonment of the proceedings under the distress of the 28th of August as entitled the defendant to distrain subsequently for the same rent, or any part thereof; which his Lordship declined to do, and told the jury that if they believed the evidence given on behalf of the defendant relative to the distress of the 28th of August, the defendant was not precluded from distraining subsequently for part of the same rent.

Fifthly, that the plaintiff was at all events entitled to a verdict on the second count, by reason of the distress of the 21st of September (this ground had not been relied on at the trial by the plaintiff's Counsel until after the case of the defendant had closed, and after the plaintiff's Counsel had addressed the jury in reply). This his Lordship declined to tell the jury, and expressed his opinion to be that the plaintiff was not at all events entitled to a verdict on the second count by reason of the distress of the 21st of September. To which several directions the plaintiff's Counsel excepted, and the jury, having been discharged by consent from finding on the special pleas, found a verdict on the general issue for the defendant.

R. Armstrong (with him *Lynch*), in support of the exceptions.

The distress of the 21st of September was voidable at the election of the tenant, but not void, so as to enable the landlord to distrain again pending the replevin. *Troy v. Kirk* (a), *The Duke of Leinster v. Metcalf* (b), are analogous cases. The question should therefore have been left to the jury, whether the tenant intended to rely on the invalidity in the notice of distress?—[PIGOT, C. B. Upon the replevin it was open to the tenant to raise any objection rendering the distress invalid. The tenant controverts the validity of the distress by his replevin; the landlord admits it to be bad, by his notice and offer of damages. Can the tenant say "I object" and "I do not object" in the same breath?—PENNEFATHER, B. Surely

(a) *Al. & Nap.* 326.

(b) *11 Ir. Law Rep.* 365.

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the landlord is not to be compelled to wait until the next Assizes to ascertain the nature of the defence on which the tenant intends to rely.]—If then the distress of the 21st of September was valid, we were entitled to a direction generally; if invalid, to a direction on the count in trover. The other question in the case is, as to the power of the landlord, having once distrained for rent, and not having made a sufficient distress, to distrain a second time, having on the first occasion omitted to distrain all the goods on the premises. The agreement of the 4th of September did not deprive the proceedings of the 28th of August of the character of a distress: *Sells v. Hoare* (a); *Willoughby v. Backhouse* (b). We contended that it was either for the jury to say whether this agreement had that effect, or else that the Judge should have directed them that it had not; and that consequently, if they believed that there were other goods which might have been and were not distrained on the 28th of August, they should find for the plaintiff on the second count: *Branscomb v. Bridges* (c).—[PENNEFATHER, B. Is there any case to show that trover will lie where the taking is *prima facie* lawful?]—*Smith v. Goodwin* (d); *Dawson v. Crop* (e). The distress of the 21st of September was either legal or illegal; if legal, we were entitled to a direction on the count in case; if illegal, to a direction on that in trover.

J. Deane and Martley, contra.

The distress of the 28th of August was void under the late Act, and would have left the defendant liable for an unlawful seizure but for the agreement of the 4th of September. That was an abandonment of the distress.—[LEFROY, B. Though every irregularity in the distress may have been waived by it, still was not the act treated as a distress?]

—The landlord could not have known but that the goods seized would have made up the rent, and where he distrains too little, under a mistake as to the value, he may distrain again (f). Then the distress of the 21st of September was also void. The Act

(a) 1 Bing. 401.

(b) 2 B. & C. 821.

(c) 1 B. & C. 145.

(d) 4 B. & Ad. 419.

(e) 1 C. B. 961; S. C. 3 Dow. & L. 325.

(f) 1 Saund. 201, n. 1.

uses the words "illegal and void," and no subsequent proceeding could render it legal. This question has already been decided by this Court in this very case (a). As to the count in trover, there was a special plea of judgment recovered in the replevin suit pointed to that, but the plaintiff having, in point of fact, abandoned the case on that plea, no evidence was given on it, because it was admitted the defendant should recover on it. The plaintiff was bound to go into his whole case before closing, when that of the defendant appeared on the record. *Reece v. Smith* (b), *Abbott v. Parsons* (c), *Smith v. Goodwin*, and *Dawson v. Crop*, were cases of wanton abandonment. But the fifth exception was at all events too late, as appears by the record.—[PENNEFATHER, B. It is a matter of great importance that the Court should lay down a rule that each case must be opened in the proper manner and at the proper time, and that a new case shall not be made by the plaintiff at the close of the trial. I should hesitate, at *Nisi Prius*, to affix my signature to an exception founded on a new case not made in proper time.—PIGOT, C. B. The Judge is perhaps bound to receive the exception tendered to him, but the opposite party might on motion apply to the Court out of which the record came, which would not fail to punish the peccant party for what I consider his gross misconduct, by making him pay the costs of the trial.]—It was not open on the pleadings to raise such an exception. The count in trover points to the taking on the 21st of September, and the party having complained of but one *tort*, and having given evidence applying to that, was not to be permitted, when he failed as to that, to turn round and prove another. It appears clearly from the third exception, that the plaintiff throughout the trial relied on the taking on the 21st as entitling him to a verdict on the count in trover: *Stante v. Prickett* (d).

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It was a question for the jury, whether the tenant intended to avoid the distress of the 21st on the technical informality. The

(a) 3 Ir. Jur. 195.

(b) 2 Stark. 31.

(c) 5 M. & P. 521.

(d) 1 Camp. 473.

M. T. 1851. Judge having refused to leave that question to the jury, we are entitled to the decision of the Court on the first and second exceptions. *Exchequer.*
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It cannot be argued that, disregarding the intention of the tenant, the law has made such a distress void. Such was not the former decision of this Court.—[PIGOT, C. B. Our view upon the former case was, that if a tenant issued a replevin, which enabled him to rely on the defect in the notice of distress, unless he gave notice that he did not intend to rely on this defect, the landlord might abandon the distress, and distrain again.]—The question of intention was for the jury. On the third exception, if a party distrain for a given rent, he is bound to distrain fully at first, and cannot distrain a second time; all the authorities sustain this Common Law rule. The agreement of the 4th of September was not a giving up of the distress, but an arrangement as to the disposal of it. We were, therefore, entitled to a direction on the count in trover, for whenever there is a wrongful conversion, trover lies: *Dawson v. Crop*; *Holland v. Bird* (a); *Leard v. Calcott* (b).

The fourth exception arose out of what occurred in the course of the proceedings, and upon that the Judge should have told the jury that the agreement of the 4th of September was not such an abandonment of the previous distress as entitled the defendant to distrain again.

On the fifth exception the defendant had left unproved his special plea, and until the reply our exception could not have been made; but I opened this part of the case.—[PENNEFATHER, B. That makes all the difference if you opened it; but you are now insisting that you should have a finding on two takings in a count in trover, alleging only one.]—The rule is, that if you have only one count and one conversion complained of, you cannot recover on two conversions, but you may give evidence of two, so as to recover on either.

PIGOT, C. B.

In this case we are of opinion that the plaintiff is entitled to a *venire de novo*. With respect to the first and second exceptions, they are pointed either to raise a question as to the correctness of a

(a) 10 Bing. 15.

(b) 4 Q. B., N. S., 123.

former decision of this Court between the same parties, or are founded on the assumption that the Court did not then decide the questions of law which they contain. The question in the former case was whether, when a civil-bill replevin was issued by the tenant upon a distress clearly void for want of the requisite notice, and when the tenant did not give notice of the invalidity on which he relied, the landlord might abandon such distress, and distrain again? And we held that the act of issuing the civil-bill replevin being an act on which the tenant was entitled to question the validity of the distress on all points, the landlord was entitled to treat this proceeding as an election by the tenant to avoid the distress generally, unless the tenant served notice that it was not his intention to rely on the non-compliance with the requirements of the statute; and the principle of that decision was, that upon the making of the first distress, the tenant having objected to its legality, and the landlord having withdrawn, and thereby admitted his act to be void for the recovery of the rent, he might do a second act for its recovery. It is said that it was competent for the tenant, upon the trial of his civil-bill, to waive the defect of want of notice, and rely on the want of title of the landlord alone, and that such may have been his intention; the fact of his intention may be confined to his own bosom; and the only evidence of his intention in this case was what he did three weeks after issuing his replevin; there could, therefore, be no evidence from which to infer his intention at the time of issuing it. Upon this ground, therefore, the first and second exceptions must be overruled.

The third and fourth raise a different question. They have been argued with reference both to their form and substance. As to the form of the exceptions, we must view them with reference to the subject matter; and when it appears that the Judge was sufficiently apprised of what the parties intended by the exceptions, we will not scan the wording of them too narrowly. Now it appears that on this part of the case the evidence was all one way, viz., that the first distress taken was not sufficient to pay the rent. It also appeared that there was other distress on the lands at the time, and not of a character to escape observation, or such as the landlord could

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WATSON. not have found, had he chosen to seek for it. That being so, the question of law arises whether trover, the second count being in that form, lies when there has been a second distress, the first not having been sufficient, because the landlord had not taken enough. On that point *Dawson v. Crop*, has been relied on for the plaintiff, and I cannot distinguish the facts in that case from those of the present. The only question is, whether trover lies? Case clearly does; and we are all of opinion that trover also lies, either where the first distress has been abandoned without legal cause, or upon that kind of illegality in the second distress which arises from the landlord not having taken as much as he might under the first distress, and that the exceptions on this part of the case must be allowed.

It remains to consider whether the last exception can be maintained. It appeared that after the Judge had concluded his charge he was called on to tell the jury that the plaintiff was at all events entitled to a verdict on the second count, by reason of the distress of the 21st of September. Now the taking on the 21st of September was clearly unjustified by the evidence—indeed it was not contended that it was not illegal, and on that ground the plaintiff was entitled to a verdict on that count; the only question is, as to the period at which the exception was taken. The evidence tendered was sufficient to sustain both counts. The plaintiff showed the entire transaction between the parties, and called on the Judge to hold that if he was not entitled to a verdict on the first count, he was on the second, because *no answer* was given to that count. It appears to us that it was open to the plaintiff to insist on that view, and the proceedings on the common counts in *indebitatus assumpsit* are a familiar instance of the application of the same facts to different counts.

Then was the objection too late? I have often had to observe at *Nisi Prius* on the injustice of presenting at a late period of the trial a view of the case which ought to have been offered before. It has been my practice to give the party so taken by surprise the privilege of then making the necessary proofs, and denying the other party an address to the jury. It often, however, happens that this cannot be done, from the cumbrous nature of the proofs. I am very much dis-

posed to say that a misprision of that sort should be visited by sending, if necessary, the case down to a second trial, and making the peccant party pay the whole costs. In the present case, however, there is not enough on the record to raise the objection on which the defendant relies; I do not think therefore that we can, under the circumstances, do more than deal with the exception as it stands; and being of opinion that there has been a misdirection, we must grant a *venire de novo*.

M. T. 1851.
Exchequer.
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PENNEFATHER, B.*

I should be very unwilling, if the case stood as it at one time presented itself, to hold that with regard to the last exception we could not have acted on the record as it stands. A party cannot make a new case after the Judge has charged. But it now appears that the whole case was opened, and the plaintiff's Counsel has accounted for the fact that this point was not made until after the Judge had charged. I think the Judge at the trial has the power of refusing an exception presented at an improper time, stating the facts and his reason for so doing. On the third and fourth exceptions I agree with the LORD CHIEF BARON. I doubted whether trover would lie, but I cannot distinguish this case from *Dawson v. Crop*. If a second distress be wrongful after an abandonment of the first, and if therefore on the second distress trover would lie, I cannot distinguish that from the case where the second distress is wrongful by reason of too little having been taken under the first. As to the first and second exceptions, they cannot be allowed without overturning the former decision of this Court, which cannot be questioned. In the third and fourth, although there is some looseness in the wording of them, we think the substance is sufficiently presented. As to the agreement of the 4th of October, we do not think it had any prospective effect.

Venire de novo—No costs on the argument.

* LEFROY, B., was absent.

M. T. 1851.

Exchequer.

HARTLEY and another v. BLENNERHASSET.

Nov. 14.

Where an order by the Court of Chancery under the 13 & 14 Vic. c. 60, s. 35, vesting a judgment in new trustees, this Court will permit the new trustees to issue a *scire facias* upon such judgment.

DE MOLEYNs applied, on behalf of the plaintiff, that the officer of the Court might be directed to enter on the roll of the judgment in this case so much of the order of the Court of Chancery as directed the said judgment to be vested in F. G. Tinkler and F. S. Walker as new trustees. On the intermarriage of the plaintiffs this judgment, along with other securities, had been assigned to trustees for the purposes of the settlement. Messrs. Walker and Tinkler had been appointed new trustees of that settlement, and the usual order under the 35th section of the Trustee Act had been made by the Court of Chancery, vesting in them the rights of transfer, &c., under that section. No assignment however was executed to them as under the former Act, and nothing appeared on the record which would enable them to issue a *scire facias*. He submitted that as the vesting order given by the present Act had the effect of an assignment, the application should be granted.

PIGOT, C. B.

There was a mode of assignment given by the former Act which does not exist under the present. We shall therefore give permission to the plaintiffs to issue a *scire facias* in the names of the new trustees.

H. T. 1852.
Exchequer.

LECKHAM v. GRESHAM.

Jan. 19.

M. BARRY moved, under the 79th General Order, that the plaintiff, who resided out of the jurisdiction, should give security for costs.

Notice of motion for plaintiff to give security for costs is late after the time for pleading has expired, and a certificate of no plea ordered in the office.

Hickey, contra.

The motion is too late. The General Order requires that "the application shall be made before plea pleaded." The spirit of that Rule has not been complied with. The declaration was filed on the 5th of January, and the rule entered, which expired on the 14th of January. On the 15th of January a certificate of no plea was bespoken; later on the same day notice of this motion served; so that the notice was not served until the time for pleading had expired, and a step had been taken in the cause. Judgment was entered on this day, and that step was only delayed until an affidavit of the sum actually due was obtained, pursuant to the 148th General Order. The defendant knew all along that the plaintiff was out of the jurisdiction, as it so appeared on the writ.—[PENNEFATHER, B. I think, substantially to comply with the Rule, notice should be served before the time for pleading has expired.]—The rule of law is analogous to the rule in equity where the time for answering has expired: *Daniel v. Cunningham* (a). PENNEFATHER, B., there says:—"The position of the defendant here is analogous to that of a defendant at law, where the time for pleading has expired. The defendants come too late."

Barry, in reply.

On the 9th of January the defendant applied by notice to plaintiff, as authorised by the 79th General Order, for security, but received no answer. Before the New Rules the practice was to apply at any time before plea pleaded.

Edinburgh and Leith Railway Company v. Dawson (b) was referred to.

(a) 1 Ir. Jur. 36

(b) 7 Dow. P. C. 576.

H. T. 1852.

PIGOT, C. B.

Exchequer.

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We are informed that bespeaking a certificate of no plea is a step taken to mark judgment. We are of opinion that this application is too late.

Barry then applied that the judgment be set aside, and for liberty to plead "*nil debet* and infancy."

PIGOT, C. B.—We will give the defendant liberty to do so.

JOHN JACK,

Lessee of Major-General EDMUND WM. SHULDAM and others,

v.

WILLIAM BOLES.

M. T. 1851.

Nov. 24.

An arrest under a *ca. sa.*, marked for £18. 1s. 5d. the amount of the judgment, where there was less than £10 actually *due* at the time the *ca. sa.* issued, is illegal, and the defendant will be discharged: 11 & 12 *Vic. c. 28*, s. 1. Also the writ is void, and will be set aside (no fact being in dispute) without further application, although that formed no part of the conditional order, which was simply for the discharge of the defendant from custody.

MACDONOGH moved that the conditional order, that the defendant be discharged from custody under the writ of *ca. sa.*, be made absolute in this cause, on the ground that the sum due on foot of the said writ was, at the time of defendant's arrest, under the sum of £10, and notwithstanding cause, on other grounds not material to the question, for the costs of the motion, shown to the contrary.

The writ of *ca. sa.* was marked for the sum of £18. 1s. 5d., but it appeared from the affidavit that there was not at the time the execution issued £10 due. The arrest was therefore contrary to the provisions of the 11 & 12 *Vic. c. 28*, s. 71:—"That no writ of *ca. sa.*, or other writ, process or warrant to arrest the body of any defendant in any action or suit (actions for malicious prosecution, or for direct libel, slander, criminal conversation, seduction, or breach of promise of marriage, only excepted) shall be issued in Ireland, founded on a judgment, decree or order of any of the Superior

order, which was simply for the discharge of the defendant from custody.

“Courts of Law,* or of any Inferior Courts in Ireland, when the
 “sum due or to be paid by or under such judgment, &c., exclusive
 “of the costs, if any, thereby recovered, or ordered to be paid, shall
 “not exceed the sum of £10,” &c.

M. T. 1851.
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The Court having expressed its opinion that the party was entitled to his discharge—

Macdonogh then applied that the writ of *ca. sa.* should be set aside, although that did not form any portion of the conditional order.

J. D. Fitzgerald opposed the application to set aside the writ of *ca. sa.* The conditional order being silent as to every thing but the discharge of the party out of custody, the Court cannot entertain this application to set aside the writ. The proper course would be to bring an action for overmarking the execution. The writ is *primâ facie* good, as the judgment is for the sum mentioned in the writ; and the Court cannot, for the purpose of setting aside a writ as void, travel out of the record.

Macdonogh, in reply.

The Court are satisfied that the writ is bad, and the party entitled to be discharged. It is not the sum named in the judgment that is to determine the validity of the writ, it is the sum actually due; and to ascertain that, it is necessary to have recourse to matters outside the record. The writ is absolutely void; the remedy is not therefore an action for overmarking the execution, but for false imprisonment; the writ therefore should be set aside.

PIGOT, C. B.

The issuing of the writ in this case, when there was a sum less than £10 due, was illegal, and in direct contravention of the Act of Parliament. The writ is therefore void, and the Court are of opinion that it ought to be set aside, without putting the parties to the expense of another application, it being admitted that no new facts could be adduced in support of the proceedings.

* The reference in *Oulton's Index* omits the words “of any of the Superior Courts of Law.”

H. T. 1852.

Exchequer.

TENNENT v. ROBINSON.

Jan. 14, 16,
17, 20.

A Sheriff sold a term of years under a writ of *fiery facias*, and the purchaser having refused to pay the purchase-money, the Sheriff brought an action against him for the breach of contract. The first count of the declaration specified the conditions of sale under which the Sheriff sold, and which were that the highest bidder should be the purchaser, and that the purchase-money should be paid to A. B. (a third party) upon the purchaser being

declared, and that the Sheriff would not be accountable for either possession or title. It then stated that at the sale the defendant was the highest bidder and was declared the purchaser, and after averring mutual promises on the part of the plaintiff and defendant to perform the conditions of sale, alleged as a breach, that although the plaintiff as such Sheriff was ready and willing to execute a conveyance of the said term, yet the defendant did not pay the purchase-money. No tender of a conveyance by the plaintiff was averred.

The second count was more general, and stated that the plaintiff (without describing him as Sheriff) at the special instance and request of the defendant bargained and agreed to sell to him a term of years the property of J. O. H., on conditions of sale similar to those which were specified in the first count; that defendant was declared the purchaser; that although the plaintiff was ready, &c., to convey, &c., and to perform the conditions of sale—*Breach*, that defendant did not, nor would, pay the purchase-money.

Held, that it was not necessary for the plaintiff to aver the tender of a conveyance, as it was the duty of the defendant as purchaser to prepare and tender it to the plaintiff for execution.

Held also, that the non-payment of the purchase-money at the time of the sale did not prevent the plaintiff suing the defendant for a breach of contract in the non-completion of his purchase.

Held also, that the Sheriff, by disclaiming to be accountable for title or possession, did not debar himself from bringing this action.

Held also, that the averment in the second count disclosed a legal and binding contract, and that the Court would not intend otherwise.

ASSUMPSIT.—The declaration stated that whereas heretofore, to wit, on &c., at &c., a certain writ of *fiery facias* issued out of her Majesty's Court of Exchequer, directed to the Sheriff of the county of Antrim, whereby the said Sheriff was commanded that of the goods and chattels of one John O'Hara he should cause to be levied a sum of £67 for debt and costs, and also to have the said money before the Barons of the said Court on a certain day therein mentioned, and which said writ was duly marked at the foot thereof and delivered to the plaintiff, who then, and from thence until and at the time of the sale thereafter mentioned, was Sheriff of the county of Antrim, to be executed in due form of law, and proceeded to aver that the plaintiff, by virtue of the said writ, and while the same was in force, to wit, on &c., and within his bailiwick as such Sheriff, seized and took in execution divers goods and chattels of the said John O'Hara, to wit, a certain term of years, to wit, the residue then to come and unexpired of a certain term of thirty years, to be computed from the 1st day of November 1845, of and in a certain farm of land, at &c., in the county of Antrim; and that he afterwards, to wit, on &c.,

set up by public auction all the right, title and interest of the said John O'Hara in and to the said term of years, of and in the said farm of land, subject to the following conditions or terms of sale, viz.:—

"That the highest bidder should be the purchaser, and that the purchase-money should be paid to one William Orr on the purchaser being declared, and that plaintiff would not be accountable to the purchaser for any possession of the premises or title thereto." The declaration then averred that, on such exposure to sale, the defendant was the highest bidder, and then and there became and was in due manner declared to be the purchaser of the right, title and interest of the said John O'Hara in and to the said term of years, of and in the said farm of land, at and for a certain large sum of money, to wit, the sum of £35; and thereupon afterwards, to wit, on the day and year last aforesaid, at &c., in consideration thereof, and that the plaintiff, at the special instance and request of the defendant, had then and there undertaken and faithfully promised the defendant to perform and fulfil all things in the said conditions of sale contained, on the part of the plaintiff to be performed and fulfilled, he the defendant undertook, and then and there faithfully promised the plaintiff, to perform and fulfil every thing in the said conditions of sale on his part and behalf, as such purchaser as aforesaid, to be performed and fulfilled; and then averred that, although the plaintiff as such Sheriff, upon the said defendant being declared the purchaser as aforesaid, was ready and willing to execute a proper conveyance and assignment of the said right, title and interest of the said John O'Hara, in and to the said term of years, of and in the said farm of land, upon payment of said purchase-money, according to the said terms and conditions of sale, yet the defendant, not regarding the said terms and conditions of sale, nor his said promise and undertaking, did not nor would, on being declared such purchaser as aforesaid, or at any other time, pay or cause to be paid to the said William Orr, or to the plaintiff or any person on his behalf, the said purchase-money, but wholly neglected and refused so to do, to wit, at &c.

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The second count was in a more general form, and after reciting that whereas, on &c., at &c., the plaintiff, at the special instance and

H. T. 1852. request of the defendant, bargained and agreed to sell to the defendant,
Exchequer. and the defendant then and there bought of the plaintiff, all the right,
 TENNENT title and interest of one John O'Hara in a certain other farm of
v. land, at &c., for the price or sum of £35, upon the terms and con-
 ROBINSON. ditions following—"That the defendant should pay the purchase-
 "money to one William Orr, on the purchaser being declared, and
 "that the plaintiff should not be accountable to the purchaser for any
 "possession of the premises or title thereto;" averred mutual pro-
 mises to perform all things mentioned in the said last mentioned
 conditions of sale, and then proceeded to state that the defendant
 afterwards, to wit, on the day and year last aforesaid, at &c., was
 duly declared the purchaser of the said right, title and interest
 of the said John O'Hara in and to the said last mentioned farm of
 land, and averred that although the plaintiff was then and there
 ready and willing to convey all the right, title and interest of the
 said John O'Hara in and to the said last mentioned farm of land,
 upon payment of the purchase-money, according to the said last
 mentioned terms or conditions of sale, and to perform and fulfil the
 said last mentioned terms or conditions, and his said last mentioned
 promise and undertaking, in every thing on his part and behalf to
 be performed and fulfilled, whereof the defendant had notice; yet,
 that the defendant had disregarded his last mentioned promise and
 undertaking, and did not nor would, upon being declared the
 purchaser as last aforesaid, or at any other time, pay the said last
 mentioned purchase-money or any part thereof to the said William
 Orr or to the plaintiff or any person on his behalf, &c.

The declaration concluded with the money counts.

To each of the special counts of this declaration a general demurrer was taken, and also a number of special demurrers. Those to the first count were as follow :—

First.—That it does not appear by the first count that the plaintiff had authority in law to seize the goods and chattels of the said John O'Hara in said count named, inasmuch as the said plaintiff is not stated in said count to have been commanded to return the writ to the Court out of which it had issued; wherefore, and by reason that said writ is not alleged to have been returnable in due form of

law, the said seizure and all other matters and things in said count alleged to have been done thereunder were altogether illegal and void.

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Secondly.—That it is not alleged in said count that John O'Hara was *possessed* of the *term* of years in said count mentioned, or that he had entered into or been in possession thereof, or that the term was subsisting at any time while said writ was in force, or pretended so to be.

Thirdly.—That it is not alleged in the said count that the said writ was founded on any judgment; and also that the term at which judgment to authorise the issuing of said writ was entered is not stated or set forth in said count; and also that it is not stated or shown that said John O'Hara was seised or possessed of said term at the time said judgment was entered, or at any time after said judgment was entered, or that any person in trust for the said John O'Hara was then seised or possessed of said term, or that said John O'Hara had any disposing power over the same; and that, by any thing in and by said count alleged, it does not appear whether the said John O'Hara was entitled or interested in said term in possession or remainder or reversion, or that he had a mere *interesse termini* therein.

Fourthly.—That the alleged sale was illegal and void, as described in the said first count, because by the terms of sale therein set forth the purchase-money was to be paid to one William Orr, who was a stranger to the writ, which condition was contrary to the exigency thereof, which required the Sheriff to make certain sums of money by sale of John O'Hara's goods and chattels, and to have the money, the produce of such sale, in Court.

Fifthly.—That the alleged agreement to pay the money was void, being an agreement that the plaintiff should disobey said writ.

Sixthly.—That the promise in said first count alleged to have been made by the defendant is not stated to have been made for any consideration, or for any legal, valid or sufficient consideration.

Seventhly.—That it is not stated that the plaintiff tendered, or caused to be tendered, to the defendant, any conveyance of the said term of years.

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Eighthly.—That the defendant is in said count alleged to have broken a promise not stated therein to have been made by him—namely, to pay the purchase-money to the plaintiff, and that the said breach is double and too large.

The special demurrers to the second count were—

First.—That it does not appear by the second count that the plaintiff had any cause of action, inasmuch as it does not appear, nor is it therein alleged or set forth, that John O'Hara had any estate, right, title or interest in the farm of land in that count mentioned; or that the plaintiff had any right, power or authority to sell same on behalf of John O'Hara, or otherwise howsoever; or that by payment of the purchase-money to William Orr, either he or the plaintiff could or would convey to said defendant any right or title to said lands; nor does it appear by said count by whom the purchaser therein mentioned should be declared.

Secondly.—That the conditions of sale in said count mentioned are repugnant, insensible and void, as it is by them provided that the defendant should pay said alleged purchase-money on the purchaser being declared, without its being by the said conditions made compulsory on said plaintiff to declare said defendant such purchaser, so that the defendant would be bound to pay the purchase-money, whether or not he was declared such purchaser.

Thirdly.—That the purchase alleged in the second count to have been made was repugnant to that contemplated in the conditions of sale, it being described as absolute in the former, while the latter made it contingent on his being declared the purchaser.

Fourthly.—That it does not appear by whom the defendant was declared to be the purchaser.

Fifthly.—That there is no sufficient legal consideration therein alleged for the defendant's promise.

Sixthly.—That there was no averment of the tender of any conveyance by the plaintiff.

Joinder in demurrer.

M'Mechan (with whom was *Napier*), for the demurrer.

There is no sufficient consideration alleged in the first count for

the defendant's promise. The Sheriff was under no obligation to convey, the purchase-money not having been paid, inasmuch as the sale was only made on the terms of the purchase-money being paid when the purchaser was declared; and therefore, if the purchase-money had been offered to the Sheriff the day after the sale, and a conveyance tendered for execution at the same time, and the Sheriff had refused both, no action could be brought against him under these conditions of sale. The plaintiff must show that he has power, both in fact and in law, to fulfil his promise, before he brings an action for the non-performance of the defendant's promise: *Merot v. Wallace* (a). The money here was to have been paid before conveyance, and the execution creditor might have put an end to the Sheriff's power to execute any conveyance, by tendering the debt and costs: *Giles v. Grove* (b). If the defendant had entered upon the premises before the execution of the assignment to him by the Sheriff, he would have been a trespasser as against the defendant in the execution, as would the Sheriff himself if he had continued in possession of the premises after he had sold, and before he had assigned them: *Doe d. Hughes v. Jones* (c); *Playfair v. Musgrave* (d). The sale was also void on account of the condition making the purchase-money payable to William Orr. The Sheriff would be a trespasser if he entered the premises of O'Hara for the purpose of selling them for money to be paid to any one but himself; and a conveyance executed by him in consideration of money paid to William Orr would be void for want of consideration: *Lucas v. Nockells* (e); *Haslam v. Bischoff* (f). No judgment is here alleged as a warrant for the issuing of the *fieri facias*, nor is it averred that the writ itself was made returnable, or that John O'Hara was, or even had been, possessed of the term. These averments were requisite: *Doe v. Mulless* (g); *Deering v. Palmer* (h); *Scott v. Scholey* (i). These averments ought to have been shown,

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(a) 3 T. R. 17.

(b) 9 Bing. 258.

(c) 9 M. & W. 372.

(d) 14 M. & W. 239.

(e) 10 Bing. 387.

(f) 10 Bing. 423.

(g) 6 M. & S. 110.

(h) 4 Ir. Law Rep. 425.

(i) 8 East, 467.

H. T. 1852. as every thing in pleading is to be taken *fortius contra proferentem*.
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 ROBINSON. A Sheriff's sale is always made for ready money; it would be against public policy were it otherwise, as the Sheriff might then bring an action against every bidder: *Aldred v. Constable* (a). The Sheriff here had no interest in the premises sold, and suffered no damage, and therefore could maintain no action: *Com. Dig., Action sur le case*. The damages in an action brought by vendor against vendee are not the amount for which the property was sold: *Laird v. Pim* (b).

The second count cannot be supported. In it the plaintiff claims damages for breach of an alleged contract of sale, but does not profess to have any right to sell, and declares that he will not be accountable for either possession or title. He does not even allege that he tendered a conveyance, or had title to convey, but merely states that he was ready to convey, and that defendant knew he was ready: *Luxton v. Robinson* (c).

Harrison (with him *Joy*), in support of the declaration, was desired to confine himself to the second count.—[PIGOT, C. B. The only point which struck me through the argument as affecting the first count was, that it was not alleged that any conveyance had been tendered, or that the defendant had notice of the readiness and willingness of the plaintiff to convey.]—*Poole v. Hill* (d) is conclusive as to the point that the vendor is never obliged to tender a conveyance, in the absence of express stipulation. As to the non-allegation of notice to the defendant of the readiness of the plaintiff to convey, it need not be averred; the whole of the declaration in reference to this might be expunged: *Dicken v. Jackson* (e).

As to the second count, the objections amount to this, that there is no consideration for the defendant's promise.—[PIGOT, C. B. The objections resolve themselves into this, that the sale in this count appears to be a sale of that to which the vendor had no title; and the objection, if tenable, invalidates the consideration of the

(a) 8 Jur. 256.

(b) 7 M. & W. 672.

(c) Doug. 628.

(d) 6 M. & W. 835.

(e) 6 Com. B. 103.

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defendant's promise under the Statute of Pretended Titles—and this falls within the general objection of want of consideration.]—That objection cannot apply here; the plaintiff does not pretend or lay claim to any title in himself. It is unnecessary that at the time of the contract the vendor should have any title. The law on this point is settled as regards goods: *Hibblewhite v. M'Morine* (a), overruling *Bryant v. Lewis* (b) and *Wilks v. Smith* (c), extends the same principle to land, as this case shows, that the common form of the count by vendor against purchaser for not completing his purchase, where it is not averred that the land is the land of the plaintiff, is good on demurrer. In equity a specific performance of a contract is often decreed when the vendor at the time of sale had not a good title: *Salisbury v. Hatcher* (d); *Boehm v. Wood* (e). The former case appears to show that in such a state of facts the vendor could recover damages at law for breach of the contract.—[LEFRAY, B. This appears like the ordinary case of a sale in the Court of Chancery, when, upon the Master reporting title to be bad, it is nevertheless set up for sale at whatever price it will bring. It would require very special averments to bring the case within the Statute of Pretences.]—Such a form as this is absolutely necessary in such cases as that of *Williams v. Millington* (f), which was an action brought by an auctioneer for his fees against the purchaser of a third person's interest. The precedent in this case is framed after the form in *Chitty*, vol. 2, p. 297.—[PENNEFATHER, B. The count in *Chitty* appears to me to be very strange, and cannot be taken as a binding authority.]—However here the allegations in the count show the absence of all intention to deceive, and take the case out of the statute. The conditions of sale expressly publish the doubt as to the validity of the title, and disclaim all warranty in that respect. The vendor does not disclaim title, but only warranty of title. He might have had a perfectly good title, so far as appears by the conditions of sale, and yet be unwilling to warrant its validity.

(a) 5 M. & W. 462.

(b) Ry. & Moq. 386.

(c) 10 M. & W. 355.

(d) 2 Y. & Col. C. C. 54.

(e) 1 Jac. & W. 451.

(f) 1 Hy. Bl. 81.

H. T. 1852. *Lampleigh v. Braithwaite* (a), *Gernon v. Hodges* (b) and *Pothier Exchequer*. on the *Contract of Sale*, p. 5, were also cited.

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Napier, in reply.

As to the first count, there is no averment of continuing willingness on the part of the plaintiff to execute a conveyance, and notice of his readiness to convey is not averred. This last is ground of general demurrer.

As to the second count, *Wilks v. Smith* is relied upon by the other side ; but in that case the property contracted to be sold was not the property of a third person ; all the transactions ostensibly regarded the parties alone. The Court should avoid all consideration of the plaintiff being Sheriff, and should regard the transaction as a naked contract by A to sell the property of B, and distinctly within the Statute of Pretended Titles. What is the consideration of the defendant's promise ? The plaintiff is not bound to give him either title to or possession of the land. Suppose the defendant had tendered the purchase-money, and sought specific performance of the contract, what performance could have been decreed to him ? If none, it was a *nudum pactum*, and no action lies against the defendant.—[PENNEFATHER, B. May not the second count be maintained, by intending that the plaintiff was the agent of some other party ? —PIGOT, C. B. The difficulty in the frame of the count appears to be this—first, there is a bargain and sale stated, then come the mutual promises, and lastly, the averment of willingness to convey at the time of sale, *i. e.*, before the promises. Now, assuming that it was not necessary to aver continuing readiness to convey, does not the pleading amount to this, that in pursuance of an antecedent liability, the defendant undertook performance ?—PENNEFATHER, B. Is there not a good count in assumpsit, supposing the part containing the express promise were struck out ? There would appear to be sufficient left.]

In mutual promises both must be executory. Here, on the defendant's part it was so ; but on the plaintiff's part, as he was not bound by the conditions to convey, there was nothing left to be

(a) 1 Sm. L. C. 70.

(b) Yelv. 11.

done, and so the mutual promises fail, as pleaded.—[LEFROY, B. H. T. 1852.
 Suppose a power of attorney to A to sell and execute a conveyance *Exchequer.*
 for B ; A has no title, yet he can surely make a good contract for *TENNENT*
 sale, and such a contract may be well executed by him in his own *v.*
 name, although the final conveyance would of course be in the name *ROBINSON.*
 of his principal.]

PIGOT, C. B.

The only difficulty in the present case is as to the form of the pleading, as regards the first count. Although much argument has been expended against its validity, I do not think that there can be any doubt that it contains a complete contract, and sets forth a sufficient cause of action. The argument which was chiefly relied on in support of the demurrer was this:—that the plaintiff, upon the face of his pleadings, showed an infirmity in himself arising out of the character he sustained, and that inasmuch as he sold in the capacity of Sheriff, and had not done so for ready money paid immediately upon the bargain being closed, he has now no right to recover upon the contract for sale—and this, upon the ground of public policy: but it appears to me that to prevent a Sheriff enforcing contracts of this nature would be a complete subversion of public policy, and highly detrimental to the interests of the community. The Sheriff in the present case appears to have done his duty; he had received authority to sell, and accordingly he set up this term of years by auction, upon the condition that the purchaser, on being so declared, should pay the purchase-money; and the result has been this, that the defendant having refused to pay this purchase-money, and failing to complete his part of the contract, the Sheriff, acting in the discharge of his duty, has been frustrated, and prevented carrying out the requirements of the writ under which he was acting. If the Sheriff then were to be further disabled from bringing this action, the result would be that several persons had bid for property at a Sheriff's sale; the highest bidder might, by refusing to pay the purchase-money, annul the contract, and this might occur over and over again, so that the Sheriff might never be able to effect a sale. The only way to prevent such a state of things occurring,

H. T. 1852. is to oblige parties who enter into contracts to be bound by them.
Eachwayer.
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 v.
 ROBINSON. The contract which is the subject of the present action appears to have been perfectly legal, and the party who bid for the property must have been aware of the conditions of sale, and understood that if he were the highest bidder, he should pay the purchase-money and accept the property. It is contended that there is no consideration to support this action, inasmuch as the Sheriff, who was one of the contracting parties, had nothing further to do in the matter after the sale, not being, according to the conditions of sale, responsible for possession or title. The fallacy of such an argument consists in this, that in every sale of lands the vendor *ex vi termini* enters into a contract to convey the property which he sells; and the Sheriff is therefore in the present case bound to do so; and consequently as to that part of the case there is no ground for contending that there is no consideration.

It is then insisted that the declaration is bad, for not alleging a tender of a conveyance of the term mentioned in the declaration: but the case of *Poole v. Hill* (a) rules this question; in which case it was held such a tender was not necessary in such a case as the present, it being the business of the purchaser to supply the conveyance, and tender it to the vendor for his approval. As far as regards these questions, therefore, notwithstanding the very ingenious argument of the learned gentleman who supported the demurrer, we must hold that the first count is good. The only point which appears to me of any weight is a question of form in reference to the statement of the *assumpsit*, and the readiness to perform on the part of the plaintiff; and it is to be regretted that justice may sometimes be fettered by questions of this nature.

The first count alleges that there was a sale by auction, upon certain conditions published at the time, one of which was that the highest bidder should be declared the purchaser, and should on being so declared pay the purchase-money; and if the count had then averred that the defendant, in consideration of this agreement to sell to the highest bidder, had undertaken and promised to fulfil the terms contained in the conditions of sale, so far as they relate to

(a) 6 M. & W. 835.

purchasers, it would have contained the statement of a complete contract, without any further averment. However, the count, after averring in terms a sale of the property to the defendant, stating the setting up of the term of years, the bidding, and the declaration of the defendant as purchaser, goes on to aver that in consideration thereof, and that the plaintiff, at the defendant's request, had promised to fulfil every thing to be done on his part, the defendant promised to fulfil his part of the conditions of sale, that is to say, that being liable to pay a certain sum of money, he promised to do so. Then follows an averment of readiness and willingness on the part of the Sheriff, not after, but before the defendant's assumpsit, to execute a proper conveyance of the property sold; for it states that at the time of the defendant's being declared purchaser, the plaintiff was ready and willing.

Now *prima facie*, the assumpsit in the latter transaction consisted of a promise on the part of the defendant to pay the purchase-money, not at a past but at a future time, and therefore the frame of the count may be so far in point of form objectionable; but nevertheless, I am clearly of opinion that it contains upon the whole the statement of a complete contract, quite sufficient to render the defendant liable to complete the purchase. The count may therefore be sustained, and the allegation of readiness and willingness on the part of the Sheriff may be connected with the other portion of the count; and viewing it thus, the obligation will be sufficiently alleged. As regards the second count, it is contended that there appears to be no consideration for the promise it alleges, inasmuch as it does not appear that the Sheriff had any power to complete the conveyance of the lands, it not being alleged that he sold in the capacity of Sheriff or auctioneer; but that it was a mere contract by A to sell to B the property of C, a third person, with whom it does not appear that A is in any way connected. Now if we could suppose a case in which such a proceeding would amount to a valid sale, we need not be astute to seek for a case in which such a proceeding would be invalid. Suppose the case of an auctioneer selling a property, if he in such a case also acted in the capacity of agent for the sale and conveyance of the estate, he would be empowered to enter into a

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contract for the sale and conveyance of the estate, and he could complete his part of the contract, and there would be nothing illegal in such a proceeding. Again, if he were the assignee of a bankrupt, he could contract to sell the property of a third person, without any contract on his part as to right of property in himself, or title, for he would merely sell the property of the bankrupt. Such a state of facts as either of those would be perfectly legal, and if consistent with the present case we need not imagine a different state of circumstances. On this view of the case, there appears to be no more infirmity in the second than in the first count. There is one point in regard to the first count which has been urged in argument, namely, that the Sheriff might have been frustrated as regards his part of the contract by the execution debtor coming forward and paying the debt and costs.

There is no doubt that such would be the case ; but it does not follow that the contract does not remain good and valid, although the Sheriff may not be in a position to convey the property, because he may be disabled in various ways—by the act of God, or third persons, strangers to the contract. The Sheriff may be discharged from his part of the contract by payment of the debt and costs ; but if he be, the purchaser will also be quit of the contract on his part, and therefore this objection has no force. To hold that the refusal of the purchaser to pay the purchase-money should enable him to get rid of his liability in this manner, would have the effect of preventing a Sheriff from ever executing a writ of *fieri facias*. Upon these grounds there must be judgment for the plaintiff.

PENNEFATHER, B.

I fully concur in the observations that have been made by the CHIEF BARON, though, I must confess, that for a time the second count did appear to me to be objectionable. In regard to the objections which have been urged against the first count, it would be altogether at variance with public policy that such objections should prevail. In respect to that count, I agree with the CHIEF BARON that it would contain a perfectly valid contract if the latter part of it, containing the averment of the mutual promise, had been omitted.

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I am also of opinion that the plaintiff is entitled to judgment. There is only one point in regard to the first count upon which I wish to make any observations. I think the mutual promises are sufficiently pleaded, and get rid of the chief difficulties urged for the defendant, and suggested by the LORD CHIEF BARON. The conditions of sale make the highest bidder the purchaser, and this necessarily implies a conveyance to be made by the vendor upon the declaration of such purchaser. The contract is therefore so far executory as regards the vendor, and raises a sufficient consideration for the defendant's subsequent promise, which is to be regarded as a new substantive agreement by him to the same effect by him, *pro tanto*, as his first agreement at the time of the sale.

As regards the second count, I think, upon the ground relied upon by Vice-Chancellor Knight Bruce, in the case of *Salisbury v. Hatcher (a)*, that there is sufficient mutuality of contract alleged, to raise a right on the part of the plaintiff to have the conveyance carried into effect. The contract is very general; but there appears to be a good consideration for the promise, and there is nothing vicious in the contract, as we can readily imagine many cases in which this general form would be good. The demurrer must therefore be overruled.

Demurrer overruled.

(a) 2 Y. & C., C. C. 54.

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KELLETT v. STANNARD.

Nov. 18.

Trespass, for shooting a dog.—The defendant averred by way of justification that the dog was used to worry sheep, &c.; that being so used, just before he was shot by the defendant he was worrying the defendant's sheep, and that he could not be otherwise restrained from worrying his sheep. General demurrer. Causes assigned.—That the plea did not disclose a legal justification, as it should have averred that the dog was in the act of worrying, and not that he was worrying 'just before' the time when, &c. Held, that an averment that the dog was about to renew the attack would be a legal justification, and that the averments in the pleas amounted to that.

Held also, that the pleading, though

bad perhaps for uncertainty on special demurrer, was sufficient on general demurrer.

TRESPASS, for shooting a dog.—The declaration contained two counts.

First count.—That the defendant shot off and discharged a certain gun, then and there, loaded with gunpowder and shot, at and against a certain dog of the plaintiff, of the value of £20 sterling, and so greatly shot, hurt and wounded the said dog, that he was damaged and lessened in value, &c.

Second count.—That the defendant greatly hurt and wounded a certain other dog of the plaintiff, whereby, &c.

The defendant pleaded five pleas.

First plea.—Not guilty,

Second plea.—That the plaintiff ought not, &c., "Because that
 "the said dog in the said first count of the said declaration mentioned
 "had been and was used and accustomed to hunt and worry
 "sheep and lambs, to wit, at the place aforesaid, in the county aforesaid;
 "and the said defendant further saith, that the said dog being
 "so used and accustomed to hunt and worry sheep and lambs, just
 "before the said time when and soforth, to wit, on the day and
 "year in the said first count mentioned, at the place aforesaid, in
 "the county aforesaid, was hunting and worrying certain sheep
 "and lambs of the defendant, of great value, in a certain close of
 "him the defendant there situate; for which reason, and because
 "the said dog could not otherwise be restrained or hindered from
 "hunting and worrying the said sheep and lambs, he the said defendant,
 "at the time when and soforth, shot off," &c.

Third plea.—Same as the second, omitting the allegation that
 "the dog had been used and accustomed to hunt and worry sheep
 "and lambs."

The fourth and fifth pleas were similar to the second and third.

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The plaintiff demurred generally, and assigned as causes of demurrer "That the said several pleas of the defendant, secondly, "thirdly, fourthly and fifthly pleaded, do not, nor does any of them, "show a sufficient legal justification of the trespass complained of, "inasmuch as the said pleas do not, nor does either of them, state "that at the time of the committing the said trespass in the said "declaration respectively mentioned, the said dogs of the said "plaintiff, in the first and second counts mentioned, were in the "act of hunting and worrying the said sheep and lambs of the "said defendant, but that they were so hunting and worrying the "said sheep and lambs just before the said time when and soforth."

Joinder in demurrer.

Gibbon (with him *Lynch*), in support of the demurrer.

That the plea should have stated that the dog "was then" worrying the sheep: *Baynes v. Brewster* (a); *Morris v. Nugent* (b); *Janson v. Brown* (c).—[PIGOT, C. B. What I should say is, that the plea here would have met the state of facts in the case of *Janson v. Brown*, before Lord Ellenborough, and the difficulty there may have suggested the propriety of this plea.]—Lord Ellenborough distinctly held, that "just before" did not constitute a justification.—[LEFROY, B. Might not the defendant under this plea have proved a case that would have justified the shooting, even though the plea may be vague, and open perhaps to special demurrer?]
In *Protheroe v. Mathews* (d)—the strongest case for the defendant—Taunton, J., says:—"It is clear that the defendant shot the "dog; but he justifies his having so done, because the dog was "chasing the deer. The question for your consideration is, whether "the dog was in that situation when the defendant shot it? It is "not essential that the dog should have been at that very moment "engaged in chasing the deer, it is sufficient if the chasing of the "deer and the killing the dog were all the one and the same trans- "action."—[PENNEFATHER, B. And it is averred here that the dog

(a) 2 A. & E., N. S. 375.

(b) 7 Car. & P. 572.

(c) 1 Camp. 41.

(d) 5 Car. & P. 581.

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STANNARD. was accustomed to worry the plaintiff's sheep ; that he had been, just before the shooting, worrying sheep, and that it was impossible otherwise to prevent him doing so again : it seems a reasonable intendment that he was necessarily shot, in order to prevent a renewal of the attack, and it must be recollected that this is a general demurrer.]—To maintain the justification in law, it is necessary to import into the plea the averment that the dog was about to renew the attack.

The 27 *G.* 3, c. 35, s. 16, gives a specific remedy in cases where dogs worry sheep, viz., a Justice's warrant for his destruction.

George (with him *W. Brereton*), for the defendant, not called on.

PIGOT, C. B.

The plaintiff relies on the rule that when a pleading is equivocal it is to be taken most strongly against the pleader ; but although that is a good rule, there is also another rule that must be borne in mind by the Court, viz., "that if a pleading admit of a reasonable and unreasonable meaning, the reasonable one must prevail."

Now to maintain the defendant's case of justification, it is necessary to hold that the pleadings, receiving a reasonable intendment, aver that the dog, if he had not been shot, would immediately have renewed his attack ; that in fact he was about renewing his attack when he was shot. In terms, however, the pleading only avers that the dog was accustomed to worry sheep ; that just before the time when he was shot he had been worrying the sheep, and that he could not be otherwise restrained from worrying them : but giving to those statements a reasonable intendment, I think we must hold the averments sufficient and the pleading good on general demurrer. The plea of *son assault demesne* is analogous to the present, and it does not aver that the plaintiff was in the act of beating and ill-treating the defendant, but that he would have beaten, &c., the defendant, if he had not immediately defended himself. It certainly would have been necessary to prove at the trial that if the dog had not been shot, he would have immediately attacked the sheep, but such proof might perhaps easily have been made. Giving the

pleading therefore a reasonable intendment, I think the allegation is sufficient on general demurrer; but if the pleas had been specially demurred to for want of certainty there might, I think, be great difficulty in maintaining them.

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PENNEFATHER and LEPROY, B., concurred.

ORDER.—Let the demurrer be overruled, and judgment forthwith entered for the defendant on the said demurrer, without further motion.

GILHULY v. O'NEILL.

BREW v. O'BRIEN.

Nov. 25.

In these cases *sci. feci* had been directed to the Sheriffs of the counties where the defendants resided respectively, had been served and returned, payment pleaded, and issues joined thereon.

The two cases came on together, and *Meagher*, for plaintiff in the first case, now moved that the proper officer be directed to issue the jury process and record for the After-sittings of Nisi Prius, notwithstanding the *scire facias* had been directed to the Sheriff of the county of Longford. The question arose on the 171st General Order. It enables the party to direct the *scire facias* to the Sheriff of any county, notwithstanding the venue in the judgment; and the difficulty is whether the place of trial is to be determined by the venue in the judgment, or by the county to the Sheriff of which the *scire facias* is directed.

In a case in which a writ of *scire facias* was directed, under the 171st General Order, to the Sheriff of Longford, where defendant resided, the officer refused to issue the jury process, &c., to the Sheriff of Dublin, on the ground that the direction of the writ determined the venue of the action or place

of trial. The Court ordered that the plaintiff be at liberty to file a suggestion that it was more convenient to have the case tried in Dublin, and that the officer should therefore issue the jury process, &c.

Semble, that the New Rules only refer to the service of the writ, and do not affect the old practice as to the venue.

M. T. 1851. The 171st General Order was only intended to refer to the mode
Exchequer. of service, which has been altered by the 173rd General Order, and
 GILHULY the mode of service could have no effect on the original venue, viz.,
 v. the venue in the judgment.
 O'NEILL.

J. T. Ball, for defendant in the first case, and *J. D. Fitzgerald*, for the defendant in the second case.

The venue is decided by the direction to the Sheriff: *The Attorney-General v. Hartley* (a). BARON PENNEFATHER there says:—
 “Now as to the venue. That is settled by the county to the Sheriff
 “of which the writ is directed. That direction stands in the place
 “of a venue in the margin, the only use of which is to regulate
 “the place of trial.”—[PENNEFATHER, B. I do not remember to have used the words attributed to me; but at all events, if used by me, they must have been intended to apply to proceedings to which the Attorney-General was a party. The Rules under discussion were designed to abolish the practice of revivals by *nil*, but not to change the practice as to the venue.]—The Attorney-General had, under the old practice, the power of directing the writs to any county he pleased, and it was the object of the New Rules to extend that power to ordinary parties.—[PIGOT, C. B. According to the rule in *Musgrave v. Wharton* (b), the venue of the *scire facias* should follow the venue in the original action, which was in that case Cumberland, although the judgment was there by confession at Westminster.]—The defendant has pleaded payment, and has adopted the venue of Ennis in the county of Clare, to the Sheriff of which the writ was directed. Substantially it is a new action, founded on an antecedent fact, viz., the judgment.

Kelly on Scire Facias, p. 177, was also referred to.

Brereton, for plaintiff in second case, in reply.

By the 45th General Order “The name of a county shall in all
 “cases be stated in the margin of a declaration, and shall be deemed
 “and taken to be the venue in the action.” In *sci. feci* cases, however, as there is no venue stated except in the body of the writs,

(a) *Hayes & Jones*, 763.

(b) 3 *Cro. Jac.* 331.

viz., the venue of the judgments, the venue in the body must be treated as the marginal venue in other cases; and the venue stated in the body of the writ cannot be altered by the statement of a venue in the plea: *Tidd's Prac.*, p. 1091.

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Sir C. O'Loghlen (*amicus Curie*) mentioned a case in which the venue was changed from Dublin to Limerick, by suggestion on the record that a trial there would be more convenient.

PIGOT, C. B., delivered judgment.

We wish to free these cases from technical difficulties, and at the same time from the hazard of a Court of Error or delay. The 171st General Order was framed under a parliamentary power, conferred on the Judges, of altering the practice. The case cited from *Hayes and Jones (a)*, and the old Rule in *Cro. Jac.*, establish that, under the old practice, the direction of the *sci. fa.* was determined by the venue in the original action, and that the writ should issue to the Sheriff of that county. Now the 171st Rule alters that practice; for it provides that the writ may issue to the Sheriff of any county, but it does no more; it renders the proceeding of issuing the writ to the Sheriff of a county different from the original venue regular, which otherwise would be irregular. That Rule, together with the 173rd Rule, regulate the issue and service of the writ of *sci. fa.*, but do not, I think, thus affect the question of venue; they were framed with a view to abolish the practice of revival by *nils*, and at the same time to render the service more secure by having it effected through the hands of the Sheriff: and for carrying out the latter purpose, the party is enabled to direct the writ to the Sheriff of the county where the party resides, notwithstanding the venue in the judgment, but not, I think, to the Sheriff of any other county.

Under the old practice, in reviving judgments against heirs and tertenants, where the lands were situated in different counties, it was necessary, on account of the proceedings being of a local nature, to issue a writ to each county, and to have a trial in each county. So here, if there were several defendants, under the new practice

(a) *Sup.* 160.

M. T. 1851. writs might issue to different counties ; then, according to the construction of the Rule contended for by the defendant, how could the place for the trial of the action be determined upon ? For it can hardly be contended that it was contemplated by the framers of the Rule that there should be trials in the different counties into which the writs issued, in the same way as in cases against heirs and tenants. The best and safest course under the circumstances to be adopted is that taken in the case mentioned by Sir *C. O'Loghlen*, viz., that a suggestion be entered on the record that it is more convenient to have the case tried in Dublin.

PENNEFATHER, B., and LEFROY, B., concurred.

ORDER, in *Gilhuly v. O'Neill*.—That the plaintiff be at liberty to file a suggestion that a trial in this cause may be more conveniently had in the county of the city of Dublin than in the county of Longford, without prejudice to the defendant making such application as he may be advised, to change the venue on special grounds, and that the proper officer, upon the filing of such suggestion, do issue the jury process and record accordingly.

In *Brew v. O'Brien*, a like rule.

M. T. 1851.
Queen's Bench

JOHN JONES, Lessee of GEOFFRY DAVIES,

v.

JAMES D'ARCY.

(*Queen's Bench.*)

Nov. 11, 18.

EJECTMENT on the title, tried before BLACKBURNE, C. J., in the Sittings after Trinity Term 1850, to recover possession of the lands of Cloonsherry, Ballinacor, Cloonkeen, Shanballyline, Creavroe, Cloonfinogue, Lissalavane, Cappagh, Eskeragh, Boganes, Derrykipe, Kilcourse, Kilclough, of which lands, on the 18th of April 1769, Geoffry Davies, then of Cloonfinney (since deceased), was seised in fee. The demise was laid on the 1st of March 1850.

In Hilary 1806, A, being under a settlement made in 1769 tenant for life of thirteen denominations of land, with remainder to B in tail male, remainder to N. in tail male, A and B joined in a recovery; and

by deed of the 9th of March 1806, executed by A, B and R., it was declared that the recovery was to be to the use of B and his heirs, but that he was forthwith to execute to R. a mortgage in fee of some of the lands in the recovery, to secure a debt due from A to R.; and by deed of mortgage of the same date, A and B conveyed (by lease and re-lease) seven of the thirteen denominations to R. in fee, subject to redemption, &c. B died in January 1809 without issue, leaving N. (the next remainderman under the settlement of 1769) his heir-at-law. A died in 1816. N., having been in possession from the death of A in 1816, died in 1848, leaving the lessor of the plaintiff his eldest son, who claimed all the lands as heir in tail under the remainder to N. in the settlement of 1769. In 1810 N., by settlement on his marriage, after reciting (as if the recovery of 1806 had been in fact duly suffered) the declaration made by the first deed of the 9th of March 1806, of the uses of the recovery thereby recited to have been duly suffered, and without any further recital relating to the title, conveyed (by lease and re-lease) all the lands comprised in the deed, declaring the uses of the recovery, including those in the mortgage, to R., to the use of himself for life, remainder to his first and other sons in tail male. N. never levied a fine or suffered a recovery. The recovery of 1806 had, down to the passing of the Act for the Abolition of Fines and Recoveries (4 & 5 W. 4, c. 92), been invalid as to some of the denominations in the mortgage to R., because, though named in the deed making the tenant to the præcipe, they were not named in the recovery itself; and as to others of the mortgaged denominations, because the tenant to the præcipe was not made by C, in whom the legal freehold was outstanding, under a deed of 1799, whereby A's life estate in such of the lands as were comprised in that deed was assigned to C and his heirs in trust to make certain annual and other payments out of the rents, and to pay any surplus to A. Held, that at the time of the passing of the Act (August 1834) N., from having executed the settlement of 1810, was not in possession of the lands "in respect of any estate which the recovery, if valid, would have barred," within the meaning of those words in the 9th section of the Act; and that therefore the above defects in the recovery were cured by the 5th and 6th sections; and the lessor of the plaintiff was not entitled to recover the lands in the mortgage to R.

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Queen's Bench

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which it appeared that Geoffry Davies (the first), being seised of the above denominations of land, by indenture of the 19th of April 1769 (previously to the marriage of his son Thomas Davies the elder and Honoria O'Connor), conveyed all the said lands to Edmond Kelly and John Leonard, their heirs and assigns, to the use of the settlor Geoffry Davies (the first) for life, remainder to the use of his son Thomas Davies (the elder) for life, remainder to the use of the first and other sons successively of said marriage in tail male, with divers remainders over. This settlement was registered in 1769.

The marriage took effect, and there was issue of it four sons, Geoffry Davies (the second), Thomas Davies (the younger), Netterville Davies, Joshua Davies, and three daughters, Mary (who married a person named Bryan Duane), Belinda and Eleanor. Geoffry Davies (the first) was in possession until his death in 1777, and thereupon Thomas Davies (the elder) entered into possession, and he died in 1816. Geoffry Davies (the second) died in 1780, under age and without having been married. Thomas Davies (the younger) came of age before 1803, and died in 1809 in his father's lifetime, without being married. Netterville Davies, on the 5th of March 1810, married Eleanor Cruise, and of this marriage there was issue the lessor of the plaintiff, Geoffry Davies (the third). Netterville Davies, from the time of the death of his father Thomas (the elder) to the time of his own death, was in possession or receipt of the rents and profits of the lands. He died in 1848, leaving the lessor of the plaintiff his eldest son and heir-at-law.

By indenture of the 30th of July 1799, between Thomas Davies (the elder) of the first part, Roderick O'Connor of the second part, Honoria Davies (otherwise O'Connor) of the third part, reciting that Thomas Davies (the elder) was seised of an estate for life in the lands of Kentstown, otherwise Cloonfinogue, Cappagh, Boganes, Kilclough, Elmsfort, Creavroe, and Cloonsherry, and that for the purpose of the payment of his debts, and to provide for his younger children, he had agreed to convey the said lands to Roderick O'Connor; it was witnessed that Thomas Davies (the elder), in consideration of said agreement and of the sum of £100,

conveyed to Roderick O'Connor the said lands, *Habendum* during the life of said Thomas Davies (the elder), in trust out of the rents and profits to reimburse himself the sum of £100, and then to pay thereout during his life to Thomas Davies (the elder) an annuity of £100, and as to the residue of the rents and profits, to pay thereout to Honoria Davies, Thomas Davies (the younger), Netterville Davies, Joshua Davies, Belinda Davies and Eleanor Davies, the annual sum of £320 for their maintenance and support; and after payment of the said annuities, then to apply the residue to the discharge of the debts of Thomas Davies (the elder), which were set out in a schedule to the deed.

The deed contained a covenant by Roderick O'Connor to pay these annuities, and that he would, after the payment thereof apply the residue to the discharge of the debts of Thomas Davies (the elder), and after same were discharged he would pay the residue to Thomas Davies (the elder). It contained also a clause providing for the contingency of an increase in the amount of the rents, and a restriction upon Roderick O'Connor's power to let. This deed of the 30th of July 1799 was registered on the 15th of November 1799. Soon after its execution, Roderick O'Connor was for two years and a-half in receipt of rent out of the lands comprised in this deed.

On the 8th of February 1806, there was executed by Thomas Davies (the elder) an indenture expressed to be made between Thomas Davies (the elder) and Honoria his wife of the first part, Thomas Davies (the younger) of the second part, James Smith of the third part, and William Thomas of the fourth part; which witnessed that Thomas Davies (the elder) and Honoria his wife, in consideration of ten shillings, and for docking all estates tail in Kentstown, otherwise Cloonfinogue, Cloonsherry, Creavroe, Lissalavane, otherwise Elmsfort, Cappagh, Eskeragh, Boganes, Derrykipe, otherwise Derrykip, Kilcourse and Kilclough, granted to James Smith, his heirs and assigns, the said lands, to the intent that he might be tenant of the freehold for the suffering of a recovery or recoveries which should enure to such uses as should be declared by a deed to be executed on or before the 1st of April 1806 by Thomas Davies (the elder) and Honoria, Thomas

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M. T. 1851. *Queen's Bench* Davies (the younger) and Richard D'Arcy. This indenture of the 8th of February 1806 was not enrolled.

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In Hilary Term (46 G. 3), 1806, a recovery was suffered of the lands of Kentstown, otherwise Cloonfinogue, Cloonsherry, Creavroe, Ballinacor, Cappagh, Eskeragh, Boganes, Kilclough and Cloonkeen, in which William Thomas was defendant, James Smith the tenant, and Thomas Davies (the elder) and Honoria his wife, and Thomas Davies (the younger), were vouchees.

On the 9th of March 1806, by indenture expressed to be executed between Thomas Davies (the elder) and Honoria Davies of the first part, Thomas Davies (the younger) of the second part, Netterville Davies, Joshua Davies, Belinda Davies and Eleanor Davies of the third part, Richard D'Arcy of the fourth part, and William Smith of the fifth part, reciting certain articles of agreement of 19th of July 1803, made between Thomas Davies (the elder), Honoria Davies and Thomas Davies (the younger) of the first part, Netterville Davies, Joshua Davies, Belinda Davies and Eleanor Davies of the second part, and Richard D'Arcy of the third part, by which Thomas Davies (the elder), Honoria Davies and Thomas Davies (the younger), for the considerations therein mentioned, had assigned to Richard D'Arcy the lands of Kentstown, Cloonsherry, Creavroe, Ballinacor, Lissalavane otherwise Elmsfort, Cappagh, Eskeragh, Boganes, Kilclough and Cloonkeen; *Habendum* to Richard D'Arcy, his executors and administrators, for eleven years, from the 1st of November 1806, in trust to pay certain annuities therein specified, and that Thomas Davies (the younger) should, during such term, hold in his own hands the lands of Cloonsherry, the surplus rents, after payment of said annuities (save as to the lands of Cloonsherry), to be applied by Richard D'Arcy during said term in payment of certain debts of Thomas (the elder) and Thomas (the younger); and so soon as said debts [should be satisfied the lands should vest in Thomas Davies (the younger), subject to the annuities; and that by these articles of 19th of July 1803, Thomas Davies (the elder) and Thomas Davies (the younger) had covenanted with Richard D'Arcy to levy fines and suffer recoveries of Cappagh and Kilclough. The in-

indenture of the 19th of March 1806 further recited that, owing to mistakes in the articles, the proposed fine and recovery had not been completed ; that Richard D'Arcy had, for the benefit and at the request of Thomas Davies (the elder), and Thomas Davies (the younger), made advances to the amount of £567. 16s. 7d., and that the parties to the deed had agreed to put an end to the arrangement made by the articles of 19th July 1803, and that Thomas Davies (the elder) should surrender his life estate in the lands to Thomas Davies (the younger), his heirs and assigns, and that a recovery or recoveries should be suffered of Kentstown otherwise Cloonfinogue, Cloonsherry, Creavroe, Lisalavane otherwise Elmsfort, Cappagh, Eskeragh, Boganes, Derrykipe otherwise Derrykip, Kilcourse, and Kilclough, to the use of Thomas Davies (the younger), his heirs and assigns, but subject to the sums due to Richard D'Arcy, and subject to certain annuities to Thomas Davies (the elder) for his life, to a trustee for the separate use of Honoria Davies, to Netterville Davies and Joshua Davies respectively ; and reciting that a recovery of the above mentioned lands had been suffered, except those of Ballinacor and Cloonkeen, of which Thomas Davies (the elder) still stood seised of an estate for life. The indenture then witnessed that the matters in the articles of 19th July 1803 were to cease and be void, and that for the considerations therein Ballinacor and Clonkeen were thereby surrendered by Thomas Davies (the elder) to Thomas Davies (the younger) ; and it was thereby declared that the recovery recited to have been suffered in Hilary Term 1806 should enure to the use of Thomas Davies (the younger), his heirs and assigns, subject to and charged with the sum due Richard D'Arcy, for which Thomas Davies (the younger) was to grant D'Arcy a mortgage of certain lands in that recovery, and subject to the annuities provided for Thomas Davies (the elder), Honoria Davies, Netterville Davies and Joshua Davies respectively ; and it further witnessed that Thomas Davies (the elder), under a power in the settlement of 19th April 1769, did thereby appoint portions for his younger children, subject to a proviso for their executing this deed. The indenture then set out a covenant by Thomas Davies (the

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younger) for payment of the annuities, and a declaration that as to the lands to be mortgaged to Richard D'Arcy, this recovery suffered was to enure to the use of Richard D'Arcy, his heirs and assigns, when he should become mortgagee thereof, and a covenant by D'Arcy to surrender the leases he held of the lands of Cloonsherry and Kentstown immediately upon the execution of the mortgage, and bond and warrant collateral. There was a further covenant of Thomas Davies (the elder) and Thomas Davies (the younger) with Richard D'Arcy, for further assurance to secure his demand, and a covenant by all the parties for further assurance.

This indenture of 1806 was not executed by any of the persons named as parties, except Thomas Davies (the elder), Honoria Davies, Thomas Davies (the younger) and Richard D'Arcy, and it was registered on the 10th of March 1806.

Immediately after its execution, a mortgage was made by Thomas Davies (the elder) and Thomas Davies (the younger), to Richard D'Arcy, whereby, to secure the debt due to D'Arcy, they (by lease and re-lease) conveyed to Richard D'Arcy, his heirs and assigns, Creavroe, Lissalavane, otherwise Elmsfort, Cappagh, Eskeragh, Boganes, Derrykipe and Kilclough, *Habendum* unto and to the use of Richard D'Arcy, his heirs and assigns, subject to redemption. This mortgage was registered on the 10th of March 1806.

The special verdict further stated that by an indenture of release, made previously to and in contemplation of the marriage of Netterville Davies and Eleanor Cruise, and expressed to be between Netterville Davies of the first part, Mary Cruise and Eleanor Cruise of the second part, Richard Burke and Simon Fallon of the third part, Roderick O'Connor and James Burke of the fourth part, whereby, after reciting that by indenture of the 9th of March 1806, it was recited that a recovery had been duly suffered, Hilary 1806, of, &c. (naming the lands which that deed had recited to have been in the recovery), and that by that deed Ballinacor and Clonkeen had been surrendered, and the uses of the recovery declared as above stated, and without any further recital in relation to the title to the estate, it was witnessed that Netterville Davies, for the considerations therein, granted to Burke and Fallon, and their heirs and

assigns, Kentstown, otherwise Cloonfinogue, Cloonsherry, Creavroe, Lissalavane, otherwise Elmsfort, Cappagh, Eskeragh, Boganes, Derrykipe, Kilclough, Kilcourse, and Killahouse, to the use of Netterville for life, remainder (subject to a jointure for Eleanor) to the use of the first and other sons successively of Netterville and Eleanor in tail male.

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On the death of Netterville Davies in 1848, the defendant James D'Arcy entered and had since continued in possession of all the lands in the declaration. Geoffry Davis (the third) was the plaintiff.

The special verdict further stated a consent order, that although the lands were in Galway, the venue should be laid in Dublin.

O'Callaghan and *J. D. Fitzgerald*, were heard for the plaintiff.

They argued—firstly, that with respect to the lands of Lissalavane otherwise Elmsfort, and Derrykipe, that down to and at the time of the passing of 4 & 5 *W.* 4, c. 92 (the Act for Abolishing Fines and Recoveries), the recovery of Hilary Term 1806 was invalid and inoperative as to these lands, inasmuch as though comprised in the indenture of the 8th of February 1806, they were not comprised in the recovery itself.

Secondly.—With respect to Creavroe, Cappagh, Boganes and Kilclough, which were comprised in the indenture of the 8th of February, and in the recovery of Hilary 1806, that down to and at the time of the passing of 4 & 5 *W.* 4, c. 92, the recovery was invalid as to them, because the indenture of the 8th of February 1806 had not been duly enrolled.

Thirdly.—That with respect to these lands which were comprised in the indenture of the 30th of July 1799, that the recovery of Hilary Term 1806 was invalid, inasmuch as Roderick O'Connor, in whom at the time of execution of the indenture of the 8th of February 1806 the freehold estate at law was outstanding, under and by virtue of the indenture of the 30th of July 1799, did not make the tenant to the writ for suffering such recovery.

Fourthly.—With respect to all the lands, that the Act of 4 & 5 *W.* 4, c. 92, did not render the recovery of Hilary Term 1806 valid as to them or any part of them, inasmuch as Netterville Davies, the

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third son of Thomas Davies (the elder) and Honoria Davies otherwise O'Connor, was at the time of the passing of the Act in possession of said lands in respect of an estate which said recovery, if valid, would have barred, viz., in respect of the estate in tail male limited to the third son of Thomas Davies (the elder) by indenture of the 19th of April 1769, which estate tail remained at the time of passing of the Act unbarred and vested in Netterville Davies.

Fifthly.—With respect to all the lands, that if said estate in tail did not at the time of the passing of the Act remain vested in Netterville Davies, still the 4 & 5 W. 4, c. 92, did not render the recovery of Hilary Term 1806 valid, inasmuch as Netterville Davies was at the time of the passing of the Act in possession of the last-mentioned several lands, in respect of a certain other estate, which the recovery if valid would have barred, viz., the estate for the term of his own life limited to him by the indenture of the 5th of March 1810.

Sixthly.—With respect to all the lands, that inasmuch as the recovery was not originally valid, or by 4 & 5 W. 4, c. 92, rendered valid as to the said last-mentioned lands, the plaintiff's lessor Geoffrey Davies (the eldest son of Netterville Davies) was entitled to the possession of the said lands on the 1st of March 1850, being the day of the date of the demise in the ejectment. *Kerr d. Earl of Portsmouth v. The Earl of Effingham (a)*, was cited.

A. Graydon and Martley, for the defendant, relied on 21 G. 2, c. 11 (*Ir.*) s. 8, and 4 & 5 W. 4, c. 92, ss. 5, 8, and 9, and cited *Sir Thomas Gower's case (b)*.

Cur. ad. vult.

BLACKBURN, C. J.

Nov. 18.

This is an ejectment brought by Geoffrey Davies, claiming to be entitled to thirteen denominations of land. He states his title to to them to be as issue in tail, being eldest son of Netterville Davies, to whom they were limited in tail male by a settlement executed in 1769.

(a) 2 Str. 1267.

(b) 2 Ven. 90.

The special verdict finds the seisin in fee of Geoffry Davies in the year 1769, when he executed a settlement on the marriage of his son Thomas, limiting all the denominations in question to his own use for life, with remainder to Thomas for life, with remainder to his first and other sons in tail male. That Geoffry the settlor died in 1777. That Thomas his son thereupon entered, and died in 1816. That the eldest son of Thomas died before his father without issue, leaving Thomas (the second), who came of age in 1803, and died in 1809 without issue, leaving his brother Netterville, the third son of Thomas (the elder) his heir-at-law. That Netterville Davies lived until the year 1848, and at his death left Geoffry Davies, the plaintiff, his eldest son and heir-at-law, who claims title to all the estates.

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As to two of the denominations, namely, Ballinacor and Clonkeen, the plaintiff is clearly entitled, either as issue in tail under the deed of 1769, or as heir of his father Netterville, who was heir of Thomas (the younger). He is also admitted to be entitled to recover the lands of Shanballyline.

But as to the other denominations, the right of the plaintiff to recover depends on the effect to be given to a common recovery suffered by Thomas (the elder), and his son Thomas, in the year 1806. This recovery, when suffered, was confessedly insufficient to bar the plaintiff's title as issue in tail under the deed of 1769. It was defective as to the lands of Lissalavane, Derrykipe and Killcourse; they were named in the deed making the tenant, but not named in the recovery. It was defective as to Clonsherry, Creavroe, Cappagh, Clonfinogue, Boganes and Kilclough, because Thomas the tenant for life was not competent in 1806 to make a valid tenant to the præcipe, having in 1799 vested his life estate in Roderick O'Connor on trusts, one of which however, as to any surplus of the rents and profits, was for his own use. It was also defective as to some of those denominations which were named in the recovery, but not in the deed making the tenant to the præcipe.

The plaintiff's title to the remaining denomination of Eskeragh is out of the question; the facts found are not sufficient to show any title to it by adverse possession, he is clearly barred by the recovery.

We are now to consider the questions to which these defects in

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the recovery gave rise. The defect arising from the omissions I have mentioned would be cured by the 5th section of 4 & 5 *W. 4*, c. 92, and the defect in the recovery as to the denominations, the legal estate in which was vested in Roderick O'Connor, the trustee, would be cured by the 8th section of the same Act, unless each of these defects respectively is exempted from the operation of these sections by the 9th section. This provides that the Act shall not render valid any fine or recovery as to lands of which any person shall, at the time of the passing of this Act (that is in August 1834), be in possession in respect of any estate which the fine or recovery, if valid, would have barred.

In August 1834 Netterville Davies was in possession of all these lands; and it is plain that if he was so in possession in respect of the estate tail limited to his father by the deed of 1769, the defects in the recovery are not aided or cured by the 5th and 8th sections. The object of these two sections was to validate estates and acts depending for their validity on that of the fine or recovery; if there are no such estates or acts, these sections by reason of the 9th could have no operation, and the estate would go as it would have done had there been no previous recovery. To decide therefore, whether the above defects of the recovery of 1806 were cured, we must decide what was the estate of which Netterville Davies was seised in August 1834.

The plaintiff insists that he was then seised of an estate in tail male under the limitations of the deed of 1769, and if he was, the plaintiff must recover. But to decide whether he was so or not, we must consider the effect of the deeds executed in 1806 and 1810. The deed of the 9th of March 1806 was a deed declaring the uses of the recovery that had been suffered in the preceding Hilary Term by Thomas, the tenant for life, and his then eldest son Thomas. The parties to this deed were Thomas (the elder) and his wife, Thomas (the younger) and Richard D'Arcy, by all of whom it was executed; Netterville Davies, Joshua Davies and Belinda Davies were also named as parties, but did not execute it. By this deed Thomas (the elder) surrendered to his son two of the denominations in question, to hold for his life, and the uses of the recovery were

declared by it to be to Thomas (the younger) in fee, subject to a demand of Richard D'Arcy, for which Thomas (the younger) was to execute a mortgage, and subject to several annuities for the children of Thomas (the elder), and amongst them to an annuity of £12 to Netterville Davies for life. The special verdict finds that immediately after the execution of this deed, a mortgage in fee was executed to D'Arcy by Thomas (the elder) and Thomas (the younger) of six of ten of the denominations, the title to which is now in dispute, viz., the ten in question. The next deed found was a deed of lease and release, executed in 1810 by Netterville after the death of his brother Thomas, and in the lifetime of his father, on the occasion and in consideration of his (Netterville's) marriage. It recites the deed of the 9th of March, and the due suffering of the recovery of 1806, and the use limited to Thomas (the younger) in fee, subject to the mortgage, and it recites the charges and annuities, and then Netterville releases to trustees and their heirs, to the use of himself for life, with remainder to the first and other sons of the marriage in tail male, with divers remainders over.

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If Netterville is to be considered as having been in August 1834 seised of an estate for life under the limitations of the deed of 1810, the defects in the recovery were removed by the operation of the 5th and 8th sections of the Act; but if he was seised as issue in tail under the deed of 1769, the 9th section would have prevented this effect of the 5th and 8th. The plaintiff contends that his father became seised as tenant in tail on the death of his father Thomas in 1816: he argues that the recovery being invalid, Netterville (if he had not executed the deed of 1810) would have been remitted to his better title—that is, to his remainder in tail on the death of his father in 1816, at which time the special verdict finds that he entered.

If the case be argued on the supposition that Netterville did not execute the deed of 1810, I cannot see any ground for applying the doctrine of remitter; for on his father's death he could have had but one title, that of remainderman in tail; for the recovery being invalid, the deed of 1806 and mortgage would against him have had no operation.

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But take the case as it is, and how can the doctrine of remitter be applied to it? Netterville had in 1810 conveyed the lands by deeds of lease and re-lease to trustees and their heirs, to the use of himself for life, with remainder to his first and other sons in tail. Had the recovery barred his estate tail, he would have been seized of an estate in fee as heir of his deceased brother (Thomas), and the limitations of this deed would have been valid and indefeasible; but as his remainder in tail was not barred, the deed of 1810, by creating a base fee, operated upon it: *Took v. Glascock* (a); and though its limitations might have been defeated by his issue, he himself was *bound by them*, and therefore *entitled to no more* than an estate for life. This estate he had acquired by his own act, and not through the tortious act of any other person. The proposition contended for, that in 1816, when he entered, he was remitted to his estate under the deed of 1769, and in 1834 was in possession under the title given by that deed, and not under that limited to him by the deed of 1810, I conceive to be utterly at variance with the doctrine of remitter, the definitions and examples of which show that there must be—first, the possession of an estate created by wrong, and defeasible, and then the devolution of an estate, to the defeasance and prejudice of which the estate in possession was acquired: and further, that the doctrine of remitter is never applicable when the defeasible estate is created or acquired by the act of the party to whom the valid title devolves. This will be obvious from the following positions as to the doctrine of remitter:—"Remitter is an operation in law upon the meeting of an "ancient right remediable, and a latter state in one person where "there is no *folly* in him, whereby the ancient right is restored and "set up again, and the new defeasible estate ceased and vanished "away; and the reason hereof is, for that the law preferreth a sure "and constant right, though it be little before a great estate *by* "wrong, and *defeasible*, and therefore the first and more ancient is "the more sure and worthy title:" *Co. Lit.*, p. 347, b. And in 3 *Preston*, remitter is also defined to be an act of law which puts an end to the seisin under a wrongful and new acquired title, and

(a) 1 Saund. 260.

restores the rightful owner to the ancient seisin and better title: and in 3 *Steph. Blac. Com.*, p. 379, remitter is where he who hath the right of entry in lands, but is out of possession, obtains afterwards the possession of the lands by some subsequent and defective title. In this case he is remitted or sent back by operation of law to his ancient and more certain title. The possession he took, acquired by a bad title, shall be *ipso facto* annexed to his own inherent good one, and his defeasible estate shall be utterly defeated and annulled by the instantaneous act of law without his participation or consent; as if A disseises B, and afterwards demises the land to B, *without deed*, for term of years, by which B enters, this entry is a remitter to B, who is in of his former and sarer estate. But if A had demised to him by deed indented or matter of record, then B would not have been remitted; for if a man by deed indented takes a lease of his own lands, it shall bind him to the rent and covenants, because a man “can never be allowed to affirm that his own deed is ineffectual, since that is the greatest security on which men rely in all manner of contracting.” And in *Co. Lit.*, section 664, it is said:—“Also if tenant in tail enfeoff his heir apparent, the heir being of full age at the time of the feoffment, and after tenant in tail dieth; this is no remitter to the heir, because it was his folly, that being of full age he would take such feoffment.” The result is that the 5th and 8th clauses of the statute remove the defects of the recovery, and that the deed of mortgage of 1806 has become thereby valid and indefeasible, and is a bar to the plaintiff’s right to recover in ejectment.

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Judgment for defendant as to the denominations comprised in the deed of mortgage, and for the plaintiff as to the residue.

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*Cyrcbequer Chamber.**

GREENE, in Error, v BRACKEN.

(Error from the Court of Queen's Bench.)

Nov. 5.

Where by an agreement made between A and B, reciting that A was indebted to B in a certain amount of rent out of certain premises, and that A had claims against B for the value of the crops sown and the improvements made by him, it was agreed that A should surrender the premises, and that his claim on account of improvements and crops should be referred to arbitrators, and the amount thereof set off against the rent. The agreement then nominated arbitrators, and then followed a clause, "that in case of any disagreement between them, they should have power to call in and choose an umpire, whose decision shall be final between them." They, having differed, called in an umpire, and he made an award directing that £278 be allowed by B to A for the value of the crops, and £482 for the improvements, A giving credit thereout for the amount of rent due by him.—*Held*, that the umpire acted within the scope of his authority, the meaning of the award being, that the final decision should be his, not that of the arbitrators, and that the award was not defective in point of finality in not ascertaining the amount of rent, that not being a subject of controversy.

The first count, after reciting that certain differences were depending between the plaintiff and defendant, touching claims in respect of improvements made by the plaintiff on certain premises held by him under a lease from the defendant, and also in respect of certain crops sown by the plaintiff, and growing on same premises, for determining of which differences, and in consideration that the plaintiff would surrender said premises, the defendant agreed to leave to the decision of arbitrators the claims on account of all improvements and crops put forward by the plaintiff; and plaintiff and defendant mutually submitted themselves to the award of C. L. and R. T., arbitrators mutually named on their part to arbitrate and award concerning their claims, and empowered the arbitrators, in case of any disagreement between them, mutually to call in and choose an umpire, whose decision should be final between them; and in consideration that the plaintiff would stand to, fulfil and keep the award of the arbitrators, or the umpirage of such umpire, defendant promised the plaintiff, that he, the defendant, would stand

* *Coram* BLACKBURNE, C. J.; MONAHAN, C. J.; PIGOT, C. B.; PENNEFATHER, B.; CRAMPTON, J.; BALL, J.; JACKSON, J.; LEFROY, B., and MOORE, J.

to and keep such award or umpirage. The count then averred that the plaintiff surrendered the premises, and that C. L. and R. T. took upon themselves the burden of said reference, and that a disagreement having taken place between them as to the award they should make, they called in J. B. to be an umpire, who, having undertaken the umpirage, made his award between plaintiff and defendant, and thereby awarded that the defendant should allow the plaintiff £278 for the crops, and £482 for the improvements. —*Breach*, that the defendant did not pay the said sums.

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The second count was to the same effect. The third was a general count on an award, and the fourth was the money count. The defendant pleaded the general issue.

The case was tried before BLACKBURNE, C. J., at the Sittings after Michaelmas Term, and a verdict found for the plaintiff.

On motion for a new trial, the Court refused to set aside this verdict; and the facts having been stated on the record in the shape of a special verdict, pursuant to leave reserved for that purpose, a writ of error was brought into this Court.

The submission as stated in the special verdict was as follows:—

“Memorandum of agreement made between John Greene and Paul Bracken, with reference to certain lands and premises called Rose-mount.”

“Whereas it is the mutual desire of the said before mentioned parties, that the said Paul Bracken should cease to occupy said premises, and it appears that a certain amount of rent is due thereout, it is hereby agreed between the said John Greene and Paul Bracken, that the said Paul Bracken shall give and surrender the quiet and peaceable possession of the premises aforesaid, upon the conditions hereinafter mentioned; and in consideration of his doing so, and executing a surrender of the lease under which he holds said lands, to John Greene, the said John Greene agrees and consents to leave to the decision of arbitrators the claims on account of all improvements and crops put forward by Paul Bracken as a set-off against the rent now due on said premises. And the said John Greene, for the considerations aforesaid, does hereby promise and agree personally to pay to the said Paul Bracken such sum or

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“sums of money as the arbitrators shall award as being fairly due
 “to the said Paul Bracken, over and above the amount of rent due
 “on said premises: and the said Paul Bracken and John Greene,
 “upon their parts, do respectively further promise and agree, upon
 “the fulfilment of the award of such arbitrators, to execute any
 “deeds to carry out the effect of this agreement and the arbitrators’
 “award, if same should be necessary, at the expense of the party
 “requiring same, and to hold the said Paul Bracken harmless and
 “freed from any claim or claims which may be at any time made
 “by any of the parties claiming to be entitled to the rents or arrears
 “of rent of said premises.—[Arbitrators were then named.]—And
 “it is hereby mutually agreed upon by J. Greene and P. Bracken
 “that the said arbitrators shall have power, in case of any dis-
 “agreement between them, mutually to call in and choose an umpire,
 “whose decision shall be final between them. And it is further
 “agreed, that should either of the said arbitrators refuse to act and
 “come to a decision within the space of three days after the date
 “hereof, then the party whose arbitrator is ready to act shall be at
 “liberty to call in a valuator to act in the place of said dissentient
 “arbitrator, and the decision come to shall be binding between John
 “Greene and P. Bracken.”

The special verdict stated, that in pursuance of this agreement the premises were surrendered, that the arbitrators entered upon the reference, and having failed to agree on the matters referred to them, J. B. was called in by them and appointed umpire, and that he accepted this office and made his award. The award stated the terms of the submission, the disagreement of the arbitrators, and the appointment of the umpire, and concluded as follows:—“I, J. B., do make my umpirage in manner following: I award the sum of £278 to be allowed by John Greene to Paul Bracken as the value of the crops on the said premises. And “I further award the sum of “£482 to be allowed by John Greene to Paul Bracken as the value “of the improvements made upon the premises by P. Bracken, said “two sums making together £760, which said sum I accordingly “award to be payable by John Greene to P. Bracken on foot of said “crops and improvements, said P. Bracken however giving credit

“hereout for the amount of rent due by him in respect of said premises.”

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The special verdict found for the plaintiff damages of £543, having allowed £217 for the rent due by the plaintiff to the defendant, and judgment was entered thereon.

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The question turned on the construction of the submission and the umpirage; and the points noted were, that the memorandum of agreement did not authorise the arbitrators to appoint an umpire with power to award on the whole of the differences, but merely on so many or such part thereof as the arbitrators could not agree about; that the umpire had no power to make such award; that the umpirage was void for want of finality.

Tudor (with him *J. D. Fitzgerald*), for the plaintiff in error.

The first question is, whether the submission authorised the umpire to make the award? The agreement did not justify him in making a complete umpirage; the arbitrators alone were to make the award, and in case they differed, they were to adopt the opinion of the umpire as to such portions of it as they were unable to agree upon. In any event the arbitrators were to make the final award, only taking the opinion of the umpire on any point upon which they differed, and his decision was to be conclusive upon it. *Harlow v. Read* (a) recognises the legality of such a proviso as that in the present submission: *Sharp v. Nowell* (b). The submission contains an express reference to the arbitrators, and only to their decision, for the party is to pay such sum as the arbitrators shall award, and is silent as to any award by an umpire. Again, it says, “that the arbitrators shall have power, in case of any disagreement between them, mutually to call in and choose an umpire, whose decision shall be final *between them*.” These last words distinguish this case from any other; the words “between them” must be held to apply to the arbitrators, not to the parties. Where words by the context have acquired a particular meaning, the same meaning must attach to similar words in other parts of the instrument. Here the first, “between them,” clearly apply to the arbitrators, therefore when

(a) 1 C. B. 733.

(b) 6 C. B. 253.

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repeated they ought to bear a similar signification. There is nothing illegal in such a stipulation as this. Parties may make any stipulations they please, unless they be contrary to public policy : *Tollett v. Saunders (a)*.

But secondly, supposing the umpire had the power to make this umpirage, it is bad for want of certainty and finality ; it ought to have ascertained the exact amount of the rent ; the reference is to ascertain the balance due, that must include the ascertainment of the rent : *Cooke v. Oxley (b)*.

J. O'Hagan (with him *Thomas O'Hagan* and *Napier*), contra.

With respect to the first objection, it is contended that this should have been a divided award. Where parties agree, there can be no division ; and the very appointment of an umpire implies, in the absence of express words to the contrary, that he is to stand in the room of the arbitrators. In the ordinary submission that parties will abide by the decision of an umpire, if the arbitrators do not agree, there is no division, and there is nothing to take this case out of the ordinary rule. *Tollett v. Saunders* shows what the meaning of umpire is : *Com. Dig., Arbitrament, F* ; *Bates v. Cooke (c)*. Where it is intended to have a divisible award, there should be express words showing such intention : *Roll's Abr., Arbitrament, P 4* ; *Wicks v. Cox (d)*. Although the document be informally worded, the Court will give a plain construction to the words : *Butler v. Wigge (e)*.

With regard to the second objection, the award is clear and final ; there being no reference to the rent as a matter in dispute. The arbitrators were not bound to strike a balance : *Massey v. Aubrey (f)* ; *Plummer v. Lee (g)* ; *Wohlenberg v. Lageman (h)* ; *Waddle v. Downman (i)* ; *Higgins v. Willes (k)*.

BLACKBURN, C. J.

This is a writ of error brought on a judgment in an action of

(a) 9 Price, 612.

(b) 3 T. R. 653.

(c) 9 B. & C. 407.

(d) 11 Jur. 542.

(e) 1 Saund. 64.

(f) Sty. 365.

(g) 2 M. & W. 495.

(h) 6 Taunt. 255.

(i) 12 M. & W. 562.

(k) 3 M. & Ry. 382.

assumpsit on an umpirage. The plaintiff in error contends in the first place, that the umpire had no authority to make this umpirage; but that he was appointed for the sole purpose of forming an opinion upon such points as the arbitrators might differ upon; which opinion, when declared to the arbitrators, they were to adopt as their decision—in short that the decision was to be theirs and not his.

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It is needless to say this construction would be pregnant with the utmost possible inconvenience. But let us see if the words of the instrument oblige us to adopt it. The words of the submission in reference to this are:—"It is hereby mutually agreed upon by "the said John Greene and Paul King Bracken, that the said arbitrators shall have power, in case of any disagreement between "them, to call in and choose an umpire, whose decision shall be final "between them." The concluding words "between them" are the only ones which give any colour to the argument in support of such a construction, for which however there seems to be no ground when the previous words of the sentence are considered. It begins, "that the arbitrators shall have power in case of any disagreement between them." What is the meaning of that? What is the effect of a disagreement between them? It is that they can make no award; for if there be a difference between them, no matter how minute that difference may be, it is impossible for them to exercise their authority or make any award; they are then to call in an umpire to do that which they find it impossible for them to do, that is, to decide. The umpire must be the judge of all the matters in controversy, and decide them all, being substituted for the arbitrators, and exercising a jurisdiction co-extensive with theirs. It is as plain as words can express it, that the decision is to be his, is to be final, and is to be of and upon the whole matter, for the disagreement of the arbitrators leaves every thing undecided by them.

The words "between them," in the place where they occur, have given rise to the argument I have already adverted to; but even construed as contended for, the reference of the difference between the arbitrators may be regarded as equivalent to a reference of the matter in difference between the parties themselves. If we wanted any

M. T. 1851. authority, indeed if the words "between them" were repugnant to the
Exch. Cham. previous words of the sentence, there is authority for holding that
GREENE both might be reconciled by their transposition ; this was done in
v. a case to which I have been referred by my Brother CRAMPTON, that
BRACKEN. of *Butler v. Wigge* (a), where it was held that, to support the con-
dition of an arbitration bond, the Court would transpose or reject
insensible words, and construe it according to the obvious intent
of the parties.

The next objection is, that the umpirage is uncertain or not final. It appears that the plaintiff in the action was tenant to the defendant under a lease, and part of the terms of the submission were that he should surrender this lease, he being allowed for his improvements and for the value of the crops. It is plain that he owed some rent, but that this in its amount was not in controversy ; yet it is said that the arbitrators should have ascertained the amount of it : the answer to this is, that its amount was not disputed or a subject of the submission ; on the contrary, the words of the instrument which describe the matters submitted are expressly confined to the value of the crops and improvements, and the words which follow form a covenant by the defendant and plaintiff in error to allow the rent, about which there was no dispute, to be a set-off against the value of the crops and improvements, when their amount was liquidated and ascertained by the award. For this objection therefore there is no ground whatsoever. The judgment therefore must be affirmed.

Judgment affirmed.

(a) 1 Saund. 64.

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MACDONOGH (with *R. Armstrong*) showed cause against the conditional order of the 28th of January 1851, obtained in this case on behalf of the plaintiff, whereby it was ordered "That the plaintiff be at liberty to proceed in this cause to recover from the defendants such sum as said Company is legally and justly bound to contribute towards the indemnification of the plaintiff over and beyond the sums already received by him from the defendants and from the Atlas Insurance Company, and being the residue of that proportion of the loss sustained by the plaintiff, to which the defendants are justly and legally liable, upon the terms mentioned in the notice of this motion, unless cause be shown to the contrary upon the first day of next Term, the defendants filing their affidavits ten days before such day; and the said plaintiff being at liberty within one week from the date hereof to file such further affidavit as he may be advised, to be deemed as part of the grounds of this order."

Actions on policies of insurances against fire being brought against two Companies, A. and W. E., a consolidation order was made, whereby the plaintiff was to proceed alone with his action against the A. Company, and be at liberty therein to prove his loss as fully as he could in the two actions. The plaintiff gave the consolidation order in evidence, and proved his entire loss, so far as he had legal evidence. There was a verdict for him, the amount of

The terms of this notice, referred to in the above order, were the following:—"That in addition to the sum of £23. 10s., already lodged by the defendants to cover the loss on the fixtures, that the sum of £653. 9s. shall be considered as lodged in Court by the

which, and the costs, were paid by the hands of the A. Company, but the W. E. Company contributed its share. On the motion of the plaintiff, a conditional order was made for liberty to the plaintiff to proceed on certain terms with the action against the W. E. Company. Subsequent to that, the Act of the 14 & 15 Vic. c. 99, came into operation, which made parties eligible as witnesses; the plaintiff could consequently be examined, and make evidence of a certain stock-book, the rejection of which at a former trial might, in the opinion of the learned Judge who tried the case, have caused injustice to have been done.

Held (LEFROY, B., *dissentiente*), on motion to show cause, that the conditional order should be made absolute, as the plaintiff had been supplied with new evidence, and it appeared that injustice might have been done to the plaintiff in the first action.

Held also, that a consolidation order is not absolutely binding.

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“defendants in discharge of this action, as of the 8th of January
“instant, being the day on which the amount of the verdict, had
“against the Atlas Insurance Company, was paid over to the plain-
“tiff, and be so admitted by the said plaintiff for the purposes of the
“trial to be had in this cause ; said sum of £653. 9s. being made up
“of three-eighths of £1000, lodged by the Atlas Insurance Company
“in Court, and three-eighths of £743. 2s., the amount of the verdict
“obtained by the plaintiff against the said Company, being the pro-
“portion of the said sums which the defendants are bound to pay ;
“and so as to raise for trial in this cause the sole question whether
“any and what sum is justly and legally due to the plaintiff by the
“defendants on foot of the policy No. 197,046, bearing date the 20th
“day of February 1850, after giving all just credits as against the
“proportion of loss payable by the said defendants.”

The circumstances of the case appeared from the affidavits of the plaintiff ; Mr. Tinkler, attorney for the West of England Insurance Company ; and Mr. Webb, attorney for the Atlas.

The plaintiff in his affidavits stated he had been for twenty years, previous to January 1850, carrying on trade as a manufacturer of cloth caps, and dealer in calico, shoes, &c. His business premises consisted of two houses at opposite sides of Meeting-house-yard, but his residence and that of his family was in Prussia-street. In the month of December 1849, he took a house, No. 13 Bridge-street, and on the 26th of December 1849, commenced, with the assistance of his brother, his clerks and porter, to take stock of the goods he had in his two houses in Meeting-house-yard, and continued to do so until the 1st or 2nd of January 1850. The persons employed by him entered on slips of paper, in pencil writing as the most convenient, and least liable to injure the goods, the price, weight and quantity of each parcel. Those slips were handed to the plaintiff in a room up stairs, to which he was confined from the effects of a cold, and then were accurately copied by him into a book ; he then, believing them to be useless, threw them away. The value of the stock appearing from that book was £3500. 17s. 5d., according to the first cost price. He did not, as it was merely for his own information, cause that book to be compared by any of the people employed by

him so as to be able to prove its accuracy. The removal of the goods from Meeting-house-yard to Bridge-street commenced on the 8th of February, and was completed on the 19th of the same month, with the exception of about £56 worth, and some empty boxes. On the 18th of February, for the first time he slept in the Bridge-street premises, and on the 19th his wife, four children and two maids came to live there, and dined and slept there that day. The house had been opened for business a few days before.

On the arrival of the goods in Bridge-street, the plaintiff caused the policy of insurance which he had on his stock in Meeting-house-yard with the defendants to be cancelled, and a new one for the same amount, viz., £1500, to be effected with the defendants on his stock in Bridge-street, his stock, however, being worth about £3500; and a large quantity of goods having been ordered from England, some of which arrived before the fire, he directed a Mr. Farrelly, an accountant, and the agent for the North of England Insurance Company, to effect an insurance for £2500 with that Company. The amount of his insurance would then amount to £4000, which was not greater than the value of his stock in Bridge-street, and the goods he had ordered from England.

The plaintiff was, by the representation of his solicitor, induced to countermand the order for the latter insurance; but as Mr. Farrelly expressed disappointment at the countermand, after having communicated it to his principals in England, he consented to a policy being effected for £500; and for the residue he effected a policy with the Atlas Insurance Company, with which he had been for some years insured.

On the 19th of February 1850, an accidental fire broke out in the Bridge-street premises, and a large portion of the plaintiff's stock was thereby destroyed; that event occurred before the policies of either the Atlas or the West of England had issued or been delivered to the plaintiff.

Immediately after the fire, a body of police were placed by the agents of the said Companies to guard the stock saved from the fire, and prevented the plaintiff in any way interfering with it during the ten days they remained.

The plaintiff, when the police had been removed, caused a list to

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be made out of the uninjured goods on the premises, and then had the damaged goods removed to a public sale-room, and after due notice to the Companies sold; he next furnished his claim to the Companies, which, after all allowances (save for the damaged goods) amounted to £2952. 14s. 3d.: together with that claim the plaintiff furnished the defendants with a copy of the stock-book of January 1850, also with the particulars of the purchases since that stock-taking, and the amount of goods sold, and at the same time offered the defendants every facility for the investigation of the case, by inspection of his books, vouchers, &c.

The Companies then employed the said James Farelly and one Charles Robinson to investigate the plaintiff's claim, and the plaintiff submitted to them his books, vouchers, &c., including the stock-book of January 1850, for examination, and they were accordingly examined and checked by those persons. The said Companies, viz., the Atlas and West of England, having refused to pay the plaintiff the amount he claimed for his losses, he commenced proceedings against the two Companies, but by an order of the 6th of June 1850, made in the two causes, the plaintiff was stayed from proceeding with this action. The mandatory part of the order was as follows:—
 “It is ordered by the Court that further proceedings in the said
 “second cause (viz., *M'Evoy v. The West of England Insurance Company*) be stayed until further order, and that the said plaintiff do proceed to trial in the first cause (viz., *M'Evoy v. The Atlas Insurance Company*); the defendants in said first cause hereby consenting that “the plaintiff shall be at liberty upon such trial to prove
 “and recover in the said first cause the full amount of the damages
 “which might be recovered in both said first and second causes; and
 “the defendants in these causes also consenting that the testimony
 “of any witness or witnesses who may be examined on the trial of
 “the action in said first cause shall be read upon any future trial that
 “may be had of either causes, from the notes of the Judge who shall
 “try such first cause, in case such witness or witnesses be dead, or
 “in case the plaintiff, in the opinion of the Judge on such future
 “trial, shall be unable then to produce any of such witnesses, without
 “further motion; and no costs of this motion.” The plaintiff, in

order to prove his case at the trial, was obliged to examine the English merchants, &c., under a commission, who had supplied him with goods, although the invoices had been shown to Farrelly and Robinson by the plaintiff, and although Farrelly had been permitted, as plaintiff alleged, to inspect the books of these merchants, and found plaintiff's representations correct. Farrelly, on his cross-examination, admitted the invoices to be correct, and stated his belief that the goods had been supplied. The plaintiff was permitted at the trial to give in evidence his account books, which were principally in his own handwriting. The stock-taking book of June 1848 was also admitted in evidence, without objection. All the persons who assisted in the taking of stock in December 1849 having been produced by the plaintiff, he then offered in evidence the stock-book of January 1850. That evidence was objected to, as the book was in the defendant's own handwriting, and the plaintiff could not be examined to prove that it was correctly made out from the slips of paper before mentioned; and the objection was allowed by the LORD CHIEF BARON. The existence of the stock-book of January 1850 was proved; and also that it was inspected immediately after the fire by Farrelly and Robinson. For ten days after the stock-book was submitted to those persons, neither the plaintiff nor any one in his employment was permitted to interfere with the stock and goods rescued from the fire, which afforded the Companies' agents an opportunity of testing the general accuracy of that stock-book. The rejection of the stock-book as evidence operated very hardly on the plaintiff, as his trade to a great extent consisted in the manufacture of cloth caps, carried on by supplying cloth to room-keepers who made the caps for various prices, and who were paid on bringing their work back to plaintiff; but the number and smallness of the items made it inexpedient to make entries of them. The accountants who had investigated the plaintiff's claim were aware of that circumstance, as they had made it the subject of inquiry. A similar difficulty arose about shoes, another species of plaintiff's manufactured stock, as well as slop goods of various kinds. By the exclusion of the stock-book, the plaintiff was obliged to produce accountants, and resort to calcu-

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lations, founded to a considerable extent on conjectures, in order to approximate to an estimate of plaintiff's loss, which estimate at best was liable to many fallacies. The damaged goods were sold by Mr. Littledale the auctioneer, and produced £243. 16s. 2d., which sum was to be deducted from the sum of £2952. 4s. 3d., reducing the actual loss to £2736. 4s. 2d., of which loss the Atlas Insurance Company was bound to pay four eighths, or £1368. 2s. 0d. The defendants were bound to pay three eighths, or £1026. 1s. 6d., and the North of England the remaining one eighth, or £342. 0s. 6d., which sum was paid shortly after the trial of the case with the Atlas Insurance Company, leaving due by the defendants and the Atlas Insurance Company £2394. 3s. 6d., of which sum only £1743. 2s. 0d. has been paid, leaving a loss of £651. 1s. 6d. to the plaintiff, and which must be for ever lost unless the plaintiff be permitted to proceed against the defendant.* The plaintiff could have proved satisfactorily the amount of his loss if he were permitted to use his stock-book; but it was impossible to prove its contents by witnesses, some of whom were dead, others had emigrated, and many were altogether unknown by the plaintiff. The jury frequently expressed a desire to see the stock-book, but the legal objection to its production was insisted on by the defendants; the result was that the jury, after a trial of most unusual duration, found a verdict for the plaintiff for £743. 2s. 0d. over the sum of £1000, lodged in Court by the Atlas Insurance Company, and the defendants. After allowing every credit, the plaintiff is at a loss of £651. 1s. 6d. besides the large difference between the costs actually incurred by the plaintiff, and the costs as taxed against the party who defended the action.

It appeared from the affidavit of Mr. Tinkler, the attorney for the West of England Insurance Company, that he had co-operated with Messrs. Seymour and Webb, the attorneys for the Atlas Insurance Company, to have the entire loss ascertained in one action, which was the *bonâ fide* object of the two Companies; with that object he had served the notice of the 29th of May 1850, upon which the order already stated, of the 6th of June 1850, was pronounced. On that occasion the plaintiff elected in the first instance to proceed against the West of England Company; but as one of the Counsel

* The figures are thus in the affidavits.

engaged by the plaintiff on that motion against the Atlas Company was retained by the West of England Company, the plaintiff determined on electing the Atlas Company to proceed against, unless the West of England Company would relinquish the services of that Counsel, which being declined, the plaintiff resolved to proceed against the former Company. And the order was accordingly so made. That the agents for the three Companies, the Atlas, West of England, and North of England, by every reasonable means endeavoured to ascertain the total amount of the plaintiff's loss before they lodged the £1000 in Court; and having satisfied themselves that that sum was sufficient, the Atlas and West of England lodged their proportions, and advanced the share of the North of England, on the promise by their agent that they should be repaid. Mr. Tinkler also stated that he was present throughout the trial of the cause against the Atlas Company, and that the case opened by the plaintiff's Counsel was one of total loss, which he claimed to recover in that action, stating the entire loss to be £2736. 4s. 2d., out of which he gave credit for the £1000 lodged, and claimed a verdict for the balance; that he also gave in evidence the order of the 6th of June 1850, called the consolidation order, to show that he was entitled to recover the entire loss. That the right to prove the entire loss was admitted by the defendants' Counsel at the trial, and was throughout the twenty-eight days the trial lasted treated by all the parties concerned as the matter to be ascertained. That after the charge of the LORD CHIEF BARON to the jury had concluded, the Counsel for the plaintiff stated, if there should be a verdict for the plaintiff, it should be reduced one-eighth, or that the jury should be directed to exclude one-eighth from their finding, that being the proportion in which the North of England Company was bound; and alleged as a reason, that though the verdict was for the plaintiff, that the defendants might apply to set it aside, as the North of England Company was not a party to the order of the 6th of June 1850. The defendants' Counsel insisted that such a course would be contrary to the spirit of the order of the 6th of June 1850, and of the affidavits used on that occasion, the intention being clearly that the whole loss should be ascertained. That it was agreed by the

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BARON, that the entire loss sustained by the plaintiff should be ascertained. The plaintiff himself and his attorney were present during that discussion, and were assenting parties to the arrangement. That the agent for the Companies throughout acted under the impression and on the faith that the verdict, if for the plaintiff, would be final, and would not otherwise have entered into the rule of the 6th of June 1850. That the LORD CHIEF BARON, before he recorded the verdict, ascertained from the jury that they had found the total loss, after giving credit for the lodgment and the sum paid by Mr. Littledale for the goods sold after the fire. That the Atlas and West of England Companies, although they thought the sum awarded to the plaintiff was too large, and that there were grounds to support an application for a new trial, still thought it better to pay the amount of the verdict, as they believed that then all litigation would be necessarily ended; and accordingly, judgment having been entered on the 11th November 1850, against the Atlas Company, for the sum of £743. 2s. 0d., that sum, together with the sum of £864. 9s. 4d. for costs, was paid by the Atlas and West of England in their just proportions.

Mr. Webb, the law agent for the Atlas Company, in his affidavit, after corroborating all the statements in the affidavit of Mr. Tinkler, stated that the payment made by the agent of the North of England Company was made in ignorance of the arrangement that had been entered into between the three Companies, and occurred in consequence of a change both of the agents and attorneys of the North of England Company, since the arrangement was entered into, of which the new agent and attorney were not aware, nor were they aware of the discussion at the trial as to the one-eighth share of the loss.

Macdonogh (with *R. Armstrong*) now contended that the case being opened at the trial by the plaintiff as one of entire loss, and being so treated by all parties throughout the trial, and the amount of the verdict having been paid by the Companies in their respective proportions, under the impression that they were discharged

from their entire liabilities, it would be a gross breach of faith to attempt now to proceed with another action after the position of the parties had been thus changed: *Kennard v. Harris* (a).

The effect of the consolidation rule was to deprive the plaintiff of any such right as this: *The King v. Cousins* (b). Supposing the words in the consolidation rule "until further order" should be held to show that the Court did contemplate the possibility of the plaintiff being allowed to proceed with a second action, it becomes then a matter for the discretion of the Court. Is the plaintiff entitled to have it exercised in his favour, where the entire case has been conducted as if one trial was to decide the entire loss, and had decided it? It is in the nature of an application for a new trial, and there is no alleged ground, except that the damages are too small, which is insufficient: *Barker v. Dixie*, in note to *Turner v. Lewis* (c).—[PENNEFATHER, B. I do not think that if a jury misconduct themselves towards a plaintiff, a new trial will be refused.—PIGOT, C. B. I have often known a new trial to have been granted on that ground, and it is so laid down in the books of practice.—His Lordship referred to 2 *Arch. Pr.* by *Ch.*, p. 1326, and the authorities there collected.]—The plaintiff deferred this step until the time had passed within which defendants could move for a new trial on the ground of excessive damages, or on any other, and has taken the money of the West of England Company.—[PENNEFATHER, B. Who paid it?—The West of England Company paid its share to the Atlas, who handed it over to the plaintiff.—[PENNEFATHER, B. That is very different from what the case would be if the West of England Company had paid the money to the plaintiff, and the plaintiff had accepted it.]—The action was tried against the two Companies, and of course the plaintiff knew that they united to pay the amount of the verdict.

Fitzgibbon, with *J. D. Fitzgerald*, for the plaintiff.

It must be conceded that the question the jury tried was the entire loss, and the plaintiff went into evidence to show the entire

(a) 2 B. & C. 801.

(b) Chit. R. 265; S. C. 2 Stra. 1051.

(c) 7 Ad. & El. 255.

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loss ; but he did so because he was compelled by the order of the Court ; an order made *in invitum*, and to make which the plaintiff questions the power of the Court.—[LEFROY, B. But you gave in evidence the consolidation rule, and under it went into evidence as to the total loss.]—Certainly that is so ; still plaintiff contends the rule should not have been made : *Saltash v. Jackman*, and the same plaintiff v. nine other defendants in nine other actions (a), is a direct authority against it, and is the case that was relied on by the plaintiff when the rule was made, which shows it was made *in invitum*. This is not properly a consolidation rule : *Saltash v. Jackman*. But what is the effect of a consolidation rule ? it is to stay another action, not absolutely to bind the plaintiff : 2 *Arch. by Ch.*, p. 1175 ; *Cohen v. Bulkeley* (b). Lord Mansfield there said, “ The consolidation rule “ is never deemed absolutely binding unless the Court is satisfied “ with the event of the cause tried : ” *Foster v. Allenby* (c). Tindal, C. J., in that case said, “ If there were any new evidence to be produced, or other such matter, the rule might be opened,” &c. : *Doyle v. Douglas* (d) ; *Long v. Douglas* (e). The plaintiff was unable to make the stock-book evidence at the trial ; but he can do so now by his own evidence, which is admissible under the 14 & 15 *Vic. c. 99, s. 2*, making parties admissible as witnesses. This case is exactly analogous to the case of newly discovered evidence, which is clearly within the express authority of *Foster v. Allenby*. The West of England was not damnified, as there was nothing proved that might not have been proved without the rule ; the plaintiff might have recovered the entire £2000 against the Atlas Company, and left the Atlas Company to its remedy against the West of England Insurance Company for contribution : *Newby v. Reed* (f) ; 2 *Park on Insurance*, p. 600. With respect to the money paid to the plaintiff since the trial, he received it from the Atlas alone ; he was entitled to get it from the Atlas, and got it.

R. Armstrong in reply.

The case of *Newby v. Reed* was a case of double assurance, and

(a) 1 *Dow. & Low.* 851.

(b) 5 *Taunt.* 165.

(c) 5 *Dow. P. C.* 619.

(d) 4 *B. & Ad.* 544.

(e) 4 *B. & Ad.*, 545, note a.

(f) 1 *Sir W. Black. R.* 416.

not applicable. The case of *Sharpe v. Lethbridge* (a) was the authority relied on by the defendant in obtaining the consolidation order.—[LEFROY, B. There is a marked distinction between several actions upon the same instrument, and several actions upon different instruments.]—There was here but the one question to be tried in reference to the several policies, viz., the total amount of the loss; and in fact the action was tried against the two Companies.—[LEFROY, B. That is evident, as they gave the rule in evidence to entitle them to recover all that could otherwise have been recovered in two actions.]—The case should be decided on the law as it stood when the conditional order was obtained, and then the plaintiff could not have been examined; the new evidence has been created since the trial.—[LEFROY, B. Is there any case in which after the debt and costs have been paid in the first action, the second has been suffered to be proceeded with?]

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Perhaps not; but I am not aware of any case in which the Court has prevented the second action where there were two distinct contracts.

Armstrong.

The Act 6 & 7 Vic. c. 85, that made persons criminal or interested eligible as witnesses, never was made the reason for allowing another trial on the ground that at the time of the trial those persons were not eligible.

PIGOT, C. B.

The Court feel that this case is not free from considerable difficulty and doubt; but upon the whole, it appears to the majority of the Court better that the matter should be further investigated, and the second action accordingly be suffered to proceed. The trial occupied a considerable time, in consequence of the vast quantity of evidence that the plaintiff was compelled to produce to establish his various losses: still notwithstanding the time and labour expended, I

(a) 4 Scott, N. R. 722; S. C. 4 M. & G. 7.

M. T. 1851. think it is quite possible that complete justice was not rendered to the
Exchequer. plaintiff on that trial. The law as it then stood rendered the rejection of certain evidence tendered by the plaintiff imperative upon me
 M'EVROY who tried the case, and that evidence was of the utmost importance
 v. to the plaintiff for the purpose of establishing the amount of his
 WEST OF losses. The law has however been so altered as to make that evidence now admissible. The Courts are very slow in depriving any
 ENGLAND party of the benefit that may accrue to him from the discovery of
 INSURANCE new evidence ; and though the present case is not exactly that of
 COMPANY. newly discovered evidence, still it is one in my opinion even stronger, for the new evidence has not been, strictly speaking, discovered, but absolutely conferred on the party by the act of the Legislature. The principle however is the same in the two cases ; I think therefore we should not exclude the plaintiff from the benefit so conferred by the Legislature ; but allow him to proceed with the trial of the second action, which he is now enabled to do under more advantageous circumstances than attended the trial of the first action.

PENNEFATHER, B.

It must be recollected that this order was made *in invitum*, and though the Court had the power to make an order to restrain the party for a time, still from the reason of the thing, and the authorities, if justice appear not to have been done, and the CHIEF BARON, who tried the case, thinks that justice may not have been done, and that the party has now the means through a late Act of Parliament of supplying a link in his evidence, from the want of which the full measure of justice may have been denied to him, I think the party should no longer be restrained from proceeding with his action. If there were newly discovered evidence, it is clear on the authorities the application might be sustained, and the new Act of Parliament enabling parties to the cause to give evidence in it, and the plaintiff here having evidence to offer as a witness, makes the case very much the same. The evidence, whether it be discovered or conferred, is evidence, and its exclusion cannot occur without the hazard of injustice. A good deal of difficulty has arisen from the delay that has taken place, and the settlement between the parties that took place

during that delay. The West of England Company has contributed its share, three eighths of the verdict and of the costs, and there may now be very great difficulty in the way of the West of England Company obtaining contribution from the Atlas Company for the costs that may be incurred in this action. It would not be fair that the entire expense should be allowed to fall on the West of England Company; the Atlas in justice should contribute; but still it would not be a sufficient reason for refusing the order, that the Atlas might refuse to do what is just. If the slips of paper referred to in the plaintiff's affidavit were fairly copied and transmitted, and the book accurately made up from them, it would be good evidence. As there is evidence then to be produced, and which on its production may prove of the greatest importance to the plaintiff, I think, notwithstanding the disturbance it may cause in the arrangement of the Companies, that the plaintiff should be allowed to proceed with the second action. By any other course, I conceive great injustice might be done. I concur in the judgment of the LORD CHIEF BARON.

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LEFROY, B.

I cannot concur in the order. The circumstances which operated as difficulties on the mind of my Brother PENNEFATHER in coming to the conclusion at which he has arrived have compelled me, without I might almost say the least hesitation, to come to a different conclusion. I quite concur in the principle that the Court ought to be satisfied that justice has been done on the first trial before it will refuse to grant a new one; but I put the case on this—the party against whom the application is made has been by the act of his adversary placed in such a position with respect to those from whom he could have claimed compensation, that he must suffer an injury by this order. The West of England Company have contributed to the costs of the trial with the Atlas Company, which trial, with the concurrence of all parties, was to ascertain the entire loss, the liabilities of both parties; the plaintiff took advantage of that, and made the best case he could at the time, and the CHIEF BARON informs me that on the evidence laid before the jury, they did justice. It is possible, however, that greater justice may be done at a second trial,

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and we are to decide whether the possibility of one party having an advantage thereby is sufficient to make us place the other party in a position in which he must meet with an irretrievable loss ; for that is the position of the West of England Company : they have contributed their proportion to the debt and costs of the trial already had, and they must incur the *costs* of this new trial without having any right to contribution. The West of England Company is entitled to say, administer the strictest law, but place the parties in the position they were in. There is not a shadow of foundation for the application, except the recent Act of Parliament conferring a new right. The plaintiff may now have a benefit that is contingent, but even that chance of an advantage he had not when he applied for the conditional order ; it is an *ex post facto* circumstance, and is the plaintiff to be permitted to take advantage of it to do an injury on the chance of a benefit to himself ? I do not think that is justice or law. If the plaintiff had come to the Court before he had received the debt and costs, the case might have been different. The party having taken the benefit of the rule should take all the consequences, not rely on it when advantageous, and reject it when disadvantageous. I must therefore express my dissent from the opinion of the rest of the Court, both as to the law and the merits.

ORDER.—It is ordered by the Court that the said plaintiff be at liberty to proceed in this cause to establish his demand against the said defendants, the West of England Insurance Company. And in case the said plaintiff shall fail to prove upon the trial the amount of his loss to be greater than that found to have been sustained by him in the action brought against the Atlas Insurance Company, that the said defendants shall have a verdict entered for them, together with their costs of suit ; and in no case shall the said plaintiff be at liberty to establish a greater demand than the sum of £244. 2s. 0d., being the amount claimed by him as the proportion to be paid by the said West of England Insurance Company, over and above the

sum already received by him in the action against the said Atlas Insurance Company. It is further ordered, that the plaintiff in this cause do pay to the defendants in this cause the costs of the said conditional order of the 28th of February last, and no costs of this motion.

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WILLIAM GARVEY,

Assignee of JOHN O'DONNELL an Insolvent,

v.

DAVID SCOTT.

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Jan. 26.

MOTION to show cause against conditional order of the 6th of November 1851, to set aside the verdict had for the plaintiff at the Nisi Prius Sittings after last Trinity Term, and to enter judgment as in case of nonsuit.

The circumstances under which the case came forward were as follows:—A conditional order for judgment as in case of nonsuit was pronounced in last Easter Term. The plaintiff gave the peremptory undertaking to go to trial in the Sittings after Easter Term, pursuant to the 112th General Order.

In the Sittings after Easter Term, the plaintiff applied for a postponement of the trial, on the ground that a witness material to his case was absent from the country.

The defendant opposed that application. The LORD CHIEF BARON, however, made an order for the postponement of the trial until the Sittings of the Consolidated Nisi Prius Court, in the then next Term.

A plaintiff not being prepared to go to trial pursuant to his peremptory undertaking, in consequence of the absence of a material witness, applied to the Judge at Nisi Prius for, and obtained, a postponement until the Sittings of the Consolidated Nisi Prius Court in the next Term. The plaintiff did not proceed to trial until the Sittings after the next Term, when the defendant ob-

jected to the case being proceeded with, as he was entitled to judgment absolute as in case of nonsuit. The Judge having allowed the case to go on, the defendant disappeared, and there was a verdict for the plaintiff. On motion to set aside the verdict, and for judgment as on a nonsuit; *Held*, the verdict should be set aside; and that plaintiff, in not going to trial in Term, or having applied to enlarge the time, was guilty of neglect within the statute 28 G. 3, c. 31, s. 2. No rule on the other part of the motion.

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The plaintiff served notice of trial for the Sittings after Trinity Term; and when the case was called on, the defendant objected that the Court had not jurisdiction to try it, as the plaintiff had not gone to trial at the Sittings in Trinity Term, pursuant to the CHIEF BARON's order at Nisi Prius, and called on the CHIEF BARON to stop the trial or nonsuit the plaintiff; which the Judge having refused to do, the defendant disappeared, and a verdict was obtained by the plaintiff.

J. D. Fitzgerald (with him *Levy*), for the plaintiff.

It has never been decided in this country, that after a peremptory undertaking "nothing" can excuse the plaintiff for not going to trial. A particular meaning has been attached to the word "neglect" in the latter branch of the English statute 14 G. 2, c. 17, s. 1, corresponding to the Irish statute of 28 G. 3, c. 31; it was held that if the party did not go to trial, no matter from what cause, that it was neglect; but in more recent decisions it has been held differently: *Lumley v. Dubourgh* (a); *Rogers v. Vandercom* (b). Wightman, J., in the latter case, stated in his judgment, "That it would be too much to say the plaintiff has been guilty of neglect in not bringing on the cause to trial, when, if he had done so, he must have been defeated by the absence of his witness."—[PENNEFATHER, B. That case is very strong, for there the plaintiff was guilty of neglect in not having correctly entered the record, and thereby deprived the Judge of the discretion of seeing whether or not the case should be postponed.]—The defendant here has made no affidavit of merits; the plaintiff's attorney has; and besides, the verdict has been obtained on the evidence of hostile witnesses, and there is no instance of a judgment as in case of nonsuit being allowed under such circumstances.

Fitzgibbon (with him *Otway*), contra.

The party was peremptorily bound to go to trial: *Williams v. Edwards* (c).—[PENNEFATHER, B. Did the defendant here appear

(a) 3 Dow. & Low. 80; S. C. 14 M. & W. 295. (b) 4 Dow. & Low. 102.

(c) 3 Dow. P. C. 660.

at the trial?]—Yes ; but he only appeared to make the objection, and then disappeared.

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If the plaintiff was prevented by accident from going to trial, he should have come to the Court to have the time enlarged, before the time limited by the peremptory undertaking had expired : *Bushell v. Slack* (a). In this case at all events there was neglect, for the plaintiff, when even the enlarged time was running out, neglected to apply to have the time extended.

Levy replied, and cited *Jones v. Hows* (b). The continued absence of a material witness was sufficient ground for not going to trial during the Sittings of the Consolidated Nisi Prius Court.

PIGOT, B.

Irrespective of the necessity to apply to the Court to enlarge the time, before the period limited by the peremptory undertaking to go to trial had expired, there has been neglect, or delay at least, unaccounted for. When the case should have been tried pursuant to the terms of the peremptory undertaking, on the application of the plaintiff, I postponed the trial to the next Sittings, which occurred in Term ; and the plaintiff allowed those Sittings to pass by without either going to trial, or making any application to enlarge the time, and, in direct violation of the rule at Nisi Prius, did not proceed to trial until the Sittings after Term. Under these circumstances it is sufficient to say, that there has been clearly such delay on the part of the plaintiff as amounts to neglect within the statute. It certainly has always been the practice of this Court to enlarge the time, if owing to any fatality, such as the absence of a material witness, the plaintiff could not with justice to himself go to trial in compliance with the peremptory undertaking ; but at present I express no opinion as to the time when it is necessary that the plaintiff should apply to enlarge the time. Under all the circumstances, however, the rule we are disposed to make is, that the verdict be set aside ; and that the plaintiff do pay to defendant the costs of the conditional

(a) 4 Dow. & Low. 388.

(b) 5 Dow. P. C. 600.

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order, and of this motion; and to say no rule on that part of the motion which seeks to enter judgment as on a nonsuit, the plaintiff undertaking peremptorily to go to trial at the Nisi Prius Sittings after this Term.

PENNEFATHER, B., and LEFROY, B., having concurred—



Order accordingly.

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Jan. 15, 16,
 18, 26.

In an action of covenant for rent, by the lessor against the lessee, a plea that the lessor had assigned his reversion before the rent became due, *Held*, on demurrer, a good defence, without the averment of notice by the assignee to the lessee of the assignment.

COVENANT, for rent, by lessor against lessee.—Plea, *Actio non*; because, after the making of the indenture in the declaration mentioned, and before any portion of the rent claimed fell due, and while the reversion in the lands, &c., belonged to the plaintiff, his heirs, &c., he (plaintiff) bargained and sold the reversion to one S. M. for a year, and that by virtue of that indenture, and by force of the statute, &c., S. M. became possessed of the reversion; that by an indenture, executed the following day, the plaintiff granted and released the further reversion in the premises to R. R. C., his heirs, &c., for ever; that the term granted to S. M. expired, and that thereby the reversion in the premises, before the rent claimed in the declaration became due, was vested in R. R. C.—*Verification*.

A second plea averred the release to have been executed to S. M., and that he became seised of the reversion.

A third averred the release to have been made to S. M. to the use of R. R. C., and that he became seised of it by force of the statute.

Demurrer to the first plea; because it contained no averment that

the defendant paid the rent demanded to S. M., or R. R. C., or either of them, or that they had sued for, or recovered judgment against defendant for same, or ever demanded or required the defendant, by notice or otherwise, to pay the rent to them or either of them; that it did not appear with sufficient certainty that the plaintiff was seised of the reversion in the premises at the time of the execution of the deeds of lease and release; that it was not averred that the reversion was vested in R. R. C. at the time of the commencement of the action; that it did not sufficiently appear that S. M. or R. R. C., or either of them, ever were legally seised of the reversion in the premises, nor was entry by either of them averred, nor the receipt of the rents and profits, nor that defendant ever attorned to either of them, or paid rent; that it did not appear that R. R. C. was capable of receiving a release of the reversion in the premises; and that it did not appear that the deeds were ever delivered or acted on, nor was *profert* made of the release, nor any excuse alleged for want of *profert*.

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Similar demurrers to the second and third pleas, and joinder.

Sir C. O'Loghlen, for the demurrer.

There is no positive averment in any of the pleas that a reversion was *in esse* at the time of the assignment, nor that the assignee ever entered or interfered with the rents, but merely that the reversion was assigned; this is not sufficient: *Disney v. Butler* (a). In an action by the lessor, the lessee cannot defend himself by a plea that the lessor has assigned the reversion, unless he go on to aver notice by the assignee to pay the rent to him. There is no precedent for the present pleas. The rule on this subject is laid down in *Vin. Abr.*, tit. *Covenant*, n. a, pl. 28, and *per* Twisden, J., in *Thursby v. Plant* (b). The statute 4 & 5 Anne, c. 16,* doing away with

(a) 2 Hud. & Br. 499.

(b) 1 Saund. 234.

* Section 9.—“ And be it further enacted by the authority aforesaid, that from and after the said first day of Trinity Term all grants or conveyances thereafter to be made by fine or otherwise of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual to all intents

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attornment, by the 10th section expressly requires notice of the assignment to the lessee to make the grant complete, so as to carry the right to the rent. The statute 32 *Hen.* 8, c. 34, giving the right of action to the assignee, contains no negative words restricting the right of the original lessor: *Beely v. Parry* (a); *Bac. Abr., Covenant*, 2. In *Pope v. Biggs* (b) Bailey, J., says:—"I have no doubt that in point of law a tenant who comes into possession under a demise from a mortgagor, after a mortgage executed by him, may consider the mortgagor his landlord, so long as the mortgagee allows the mortgagor to remain in possession and receive the rents." The position of the parties in the present case is exactly analogous. The third plea omits even the averment of the plaintiff's seisin of the reversion, which is material.

Lane (with him *H. E. Chatterton*), contra.

The only question in this case arises on the statute of *Anne*. On the 9th section the plea is clearly good. But the proviso in the 10th is relied on; that, however, was only introduced for the protection of the tenant when he had paid his rent to the assignor in ignorance of the assignment. The effect of the statute was to make the grant a perfect conveyance without attornment: 2 *Bythewood*, p. 616, n.; *Birch v. Wright* (c). The assignee is therefore placed in the same position as, previous to the statute, he would have held after attornment upon the grant. The proviso in the 10th section does not substitute the notice there mentioned for the attornment, but is introduced merely in ease of the tenant. The grant is perfect without the notice, and the right of action vesting by it in the assignee

(a) 3 Lev. 154.

(b) 9 B. & C. 251.

(c) 1 T. R. 386.

and purposes, without any attornment of the tenants of any such manors, or of the lands out of which such rents shall be issuing, or of the tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made."

Section 10.—"Provided, nevertheless, that no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conuzor, or by breach of any condition for the payment of rent, before notice shall be given to him of such grant by the conuzee or grantee."

is divested out of the assignor. Even before the statute, a grant by fine, or under the Statute of Uses, was complete without attornment. *Moss v. Gallimore* (a) shows it to be the common practice in mortgage cases to sue in the name of the mortgagee. *Pope v. Biggs* was the case of a lease made after the mortgage. The right of distress, if their construction be correct, could not be exercised by a grantee before notice; but there is no precedent of an avowry averring notice.—[PENNEFATHER, B. The making the distress would be itself notice, as much as bringing an action.]—As to the third plea, the grant being stated as one under the Statute of Uses, and attornment having been unnecessary to such a conveyance even before the statute of *Anne*, notice is unnecessary now: *Com. Dig., Attornment*, L; *Co. Lit.*, p. 309, b; *Sir Moyle Finch's case* (b); *Birch v. Wright* (c); *Watts v. Ognell* (d). Though the tenant is protected in paying rent to the assignor before notice, it does not therefore follow that the assignor has a right to enforce it. What the Court is called on to hold is, that under the 10th section, until notice to the lessee from the assignee, the right to recover the rent remains in the assignor, unaffected by the assignment. That is not equivalent to the language of the section, which affects merely to save the tenant from prejudice. *Beely v. Parry* does not apply, being the case of an action by the assignee.

They also cited *Rives v. Watson* (e); *Johnson v. Jones* (f); *Sheph. Touch.* p. 253; *Bickford v. Parsons* (g); *Cooke v. Moylan* (h); *Burrowes v. Graydon* (i).

Napier, in reply.

The pleader must make a good title *in omnibus*; he must show that he comes within the statute; “and when the statute speaks of an assignee, it is intended of a complete assignee:” *Malorie's case* (k). In the analogous case of the assignment of a judgment, upon the

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(a) 1 Doug. 279.

(c) 1 T. R. 384.

(e) 5 M. & W. 255.

(g) 5 C. B. 920.

(i) 1 Dow. & L. 213.

(b) 6 Rep. 68, b.

(d) Cro. Jac. 192.

(f) 9 Ad. & El. 208.

(h) 1 Exch. 67.

(k) 5 Rep. 113.

H. T. 1852. 9 G. 2, c. 5, it has been decided that payment to the conuzee of a judgment before notice of its assignment protects the conuzor from an action by the assignee: *Boyle v. Ferrall* (a). The pleader should therefore show that, before action brought, the assignee had fully clothed himself with the right to recover by giving notice to the lessee. Then there is no sufficient statement that the reversion was in the plaintiff, and of that there should be a positive averment.—[PENNEFATHER, B. The averment in the plea is good enough.]—*Fryer v. Coombes* (b); *Disney v. Butler* (c). They should also have shown the character of the reversion; for though the continuance of a fee-simple will be presumed, that of a less estate will not: *Cumming v. Hartnett* (d). —[PENNEFATHER, B. The averment is, “to him and his heirs.”]

Cur. ad. vult.

PIGOT, C. B.

Jan. 26.

The main question for decision is, whether to an action brought by the lessor for the recovery of rent, a plea stating the assignment of his reversion by the lessor, previous to the rent becoming due, is a good defence to the action? This plea has been demurred to, and the ground of demurrer is, that it should have gone on to aver notice to the lessee of the assignment of the reversion to which the rent was incident, as before the Statute of Attornments it would have been necessary to plead an attornment by the lessee to the assignee; and this argument is founded on the 10th section of that statute. The question therefore we have to determine is, not as to the right of the assignee to maintain an action for rent due after the assignment, but whether the lessor can maintain this action against the lessee upon his covenant, notwithstanding the assignment, before notice of it? Several cases have been cited containing *dicta* on the subject, some importing, and others assuming, that until notice of the assignment to the lessee the right of the original lessor to the rent continues, and that the assignee, until such notice, has acquired no right at all. In *Pope v. Biggs*,

(a) 12 Cl. & Fin. 763.

(b) 4 P. & D. 120.

(c) 2 H. & B. 499.

(d) Al. & Nap. 149.

and in some text-books, this principle seems to have been taken for granted; but there is no direct authority deciding the question. This absence of authority is not so much to be wondered at in the English reports, as there is no Registry Act in operation in England except as to a small portion of the kingdom, and the tenant, being unable therefore to ascertain the fact of the assignment, wants the materials to enable him to frame such a plea as the present. But it is strange that in this country there is no authority on the subject to guide us.

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The state of the law previous to the passing of the Statute of Attornments presents a double aspect; first, as regards conveyances at Common Law, and secondly, as regards those under the Statute of Uses. In the case of the former, attornment was necessary to create a liability on the part of the lessee to the assignee of the reversion, and to do away with the liability that previously existed to the lessor, arising out of the privity which existed between lessor and lessee; the attornment of the lessee being analogous to the assent of the vassal under the feudal system. But in the case of conveyances operating by the Statute of Uses, no attornment was necessary, as that species of conveyance took effect by operation of law; and therefore also an *elegit* creditor, who obtained a statutable assignment of a moiety of the lands of his debtor, might bring an action or make an avowry without attornment. But although attornment was not necessary in such cases, there was an equitable principle of law then existing, and it is recognised in *Watts v. Ognell*, which decided that, until notice to the tenant, he should not be prejudiced by the assignment of the reversion, although there was no statute at that time containing such a proviso.

We must next consider what the Legislature contemplated and effected by the Statute of Attornments. The 9th section enacts that all grants, &c., of manors and rents, and of the reversion or remainder of any lands, "shall be good and effectual without any attornment of the tenants, &c., as if such attornment had been had and made." The statute uses the words "all conveyances," and not content with saying that they shall be valid "without attorn-

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ment," the expression is added, "as if such attornment had been had and made." The object and effect therefore of that section were to place the parties in the same position in which they would have been before the statute, upon a conveyance then made, accompanied by attornment—to effect a complete substitution between the assignee and lessee of that privity which before existed between the lessor and lessee. The 9th section having thus dealt with attornment, the 10th provides a protection for the tenant who has paid his rent to his lessor in ignorance of the fact of the assignment. It enacts that "no such tenant shall be prejudiced or damaged by *payment of any rent* to any such grantor, &c., or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conuzee or grantee." It declares that the previous comprehensive enactment shall not prejudice the tenant in case he shall have paid rent to his lessor previously to any notice to him of the assignment of the reversion; in analogy to the position of conveyances under the Statute of Uses, as they existed before the Statute of Attornments, by which, while the relation of landlord and tenant was immediately created between the assignee of the reversion and the lessee, yet the latter was protected as to all payments made by him to his lessor previous to notice of the assignment. The operation of the statute therefore creates a uniformity in the effect of all conveyances of the reversion, and renders the relation complete between the assignee and lessee, except as to rent paid to the lessor before notice of the assignment; and the bringing of an action has been held equivalent to notice. The notice of assignment does not create the liability; the Act merely protects the tenant from a second claim for rent which he had previously paid. Difficulties may arise from this construction, as when the conveyance is made for the purpose of securing the payment of an annuity, and the assignee is only to receive a portion of the rents; in such case embarrassment may ensue from a division of the payment, but a like inconvenience might arise from an opposite construction of the statute. Several *dicta* have been cited for the purpose of leading us to a different conclusion, but these may have been loosely made or negligently recorded, not being pronounced

upon the point actually for decision. Upon all the cases cited, and the language of the Legislature, it appears to me that the object of the 10th section was merely to protect the tenant in the case of a payment made under a misapprehension. I think therefore there should be judgment for the defendant.

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PENNEFATHER, B.

I fully concur in the opinion of the CHIEF BARON, and such was my impression from the beginning, although it was strongly urged that, though the reversion to which the rent was incident had been taken out of the plaintiff, yet that he could maintain an action for the recovery of the rent; and the position of mortgagor and mortgagee was adduced as analogous to that of the parties here. There was certainly some plausibility in the manner in which this argument was put, and it became necessary to consider the relation between the lessor, lessee and assignee of the reversion since the passing of the Statute of Attornments. That Act provides that attornment shall be no longer necessary, and that all conveyances shall take effect "as if attornment had been had and made." This expression is very forcible, and must be taken to mean as if attornment had been made on the execution of the conveyance. This must be the construction, otherwise it would be difficult to say at what time it was contemplated that the effect should take place. The assignment therefore is complete on the execution of the conveyance, and carries with it an immediate right to the incidents of the reversion. Then, in order to protect the tenant who should have had no notice of the assignment, the 10th section provides that the tenant who has paid rent to the person whom he considered to be still his landlord shall be protected against the demand of the assignee who had not given him notice of the assignment of the reversion to himself. The latter clause effects no more than this. The object of the statute is twofold; first, to entitle the assignee to the reversion without attornment; and secondly, to protect the tenant. It had no other effect; and the tenant will always be safe in paying rent to his lessor, before notice of the assignment, if he demand it.

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PEDDER.

I need not enter into the question at length, as I altogether concur in the observations of the CHIEF BARON, and BARON PENNEFATHER. The action in this case was brought by the original lessor for rent that accrued due after the conveyance of the reversion, and the latter fact is the defence on which the tenant rests. It is plain that a conveyance of the reversion, when complete, must effect a transfer to the assignee of the right to recover the rent; and therefore at Common Law, when attornment had taken place, the entire estate passed, and all the rent that accrued due after, but not before. *Co. Lit.* p. 310 *b*, decides this. He says:—"Albeit the attornment be made many years after the feoffment, yet it shall have relation to make it pass out of the feoffor *ab initio*, even by the livery upon the feoffment, but not to charge the tenant with any mesne arrearages, or for waste in the meantime, or the like." This provision as to the rents between the feoffment and attornment necessarily raises the implication that after attornment they belong to the assignee. So also in the following clause:—"If a reversion of land be granted to an alien by deed, and before attornment the alien is made a denizen, and then the attornment is made, the King, upon office found, shall have the land, for as to the estate between the parties, it passeth *ab initio*;" that is, from the date of the deed, but not as to the tenant, he being protected from liability to the assignee until attornment made, although as between the parties the attornment will have relation back to the deed. That was the state of the law formerly, but the statute provides that in all conveyances the deed shall operate as if attornment had been made. Now what was the effect of attornment? It made the tenant liable to the grantee of the reversion for all rent which had fallen due after the attornment; when therefore attornment was rendered unnecessary, it would follow that the tenant would become liable to the assignee from the execution of the deed; and if there were no saving clause in the Act, he might be made liable to pay a second time any rent that had become due after the date of the deed, although he had paid it before to his original lessor, ignorant of the fact of the assignment.

But there is a clause protecting him in case of actual payment to his original lessor. In the case of a rent which accrued due after the assignment, the tenant would have had no protection at Common Law, even though he had paid it to his original lessor before notice of the assignment; the statute then interposes to prevent this injustice, and protects the tenant as to any payment made before notice: but this does not interfere with the rights of the lessor or assignee, they continue as they were, the deed having taken effect from its date, the attornment operating, as Coke says, by relation to the deed. The tenant cannot take out of the assignee any right that vested in him by the transfer of the reversion, except by payment of rent; and if the assignee bring an action for the rent, which amounts to notice of the assignment, and the tenant subsequently pay the rent to the original lessor, even upon that actual payment he would not be protected. An argument was founded on the supposed analogy of the case of mortgagor and mortgagee, but it does not apply; for in the transfer of the reversion between mortgagor and mortgagee a power of attorney is generally executed, or a declaration made that the mortgagor may proceed in the name of the mortgagee, and when such provision is not made it is usual in practice to make an application to the mortgagee that the mortgagor may use his name. Then in the case of an absolute conveyance of the reversion, can it be said that the purchaser is not entitled to the rent from the date of the conveyance? or that the right vested by the conveyance in the assignee can be re-transferred to the assignor, merely by the fact of the tenant's ignorance of the conveyance? On the other hand, the tenant is not to be compelled to pay the same rent twice over. I may observe, that my judgment in favour of the defendant is founded on those pleas which aver the existence of a reversion, and of a rent incident to it, and the transfer of the reversion to the assignee. If any of the pleas do not contain averments to this effect, I should hold them insufficient.

Demurrer overruled.

H. T. 1852.
Exchequer.
 CONRAN
 v.
 PEDDER.

M. T. 1851.
Cr. Appeal.

Court of Criminal Appeal.*

THE QUEEN v. THOMAS BURKE.

Dec. 20.

A prisoner was indicted under 14 & 15 Vic. c. 19, s. 1, for being found at night armed with a dangerous and offensive instrument, to wit a stone, with intent to break and enter a dwelling-house, and commit a felony therein. The evidence was that when the prisoner was arrested he was beating the door of the dwelling-house with a large stone; and the jury were directed to convict the prisoner if they believed he had the stone in his possession with the intent of effecting a felonious entry into the house, and the prisoner was convicted. *Held*, that the Judge was not justified in assuming

that the stone was an offensive weapon within the meaning of the statute, but should have left that question to the jury.

Held also, that evidence should have been given of a felonious intent, to justify a conviction under this statute.

THIS was a case reserved from the Quarter Sessions of the Queen's County, held before James Gibson, Assistant-Barrister, on the 20th of October 1851.

The case stated that the prisoner was indicted for that he, on the 8th of September (15 Vic.), about the hour of eleven o'clock on the night of the same day, at &c., was then and there found armed with a certain dangerous and offensive instrument, to wit a stone, with intent then and there the dwelling-house of Henry Vallance, there situated, to break and enter, and to commit felony therein—that is to say, feloniously to steal, take and carry away the goods and chattels of the said Henry Vallance out of the said dwelling-house, contrary to the form of the statute, &c.

On behalf of the prosecution it was proved by a police-constable, that on the night in question he saw the prisoner stooping down upon his knees at the door of the prosecutor's house. The prisoner had a stone in his hands, with which he was striking the bottom of the door, and was working with the stone (a piece of flag about 7lbs. weight) when he was taken into custody, and some matches were found on his person. There were no traces of any injury or violence having been done to the door. The prisoner was making a good deal of noise at the door, so much so that the witness was surprised the inmates were not disturbed by it. The house had been attempted to be broken into some time previously.

* *Coram* BLACKBURN, C. J.; MONAHAN, C. J.; PERRIN, J.; BALL, J. MOORE, J., and LEFROY, B.

The Assistant-Barrister stated that, feeling doubts whether the facts proved were sufficient to sustain the indictment, his impression being that a stone did not come within the meaning of the words "weapon or instrument" used in the statute under which the indictment was framed, the being armed with which, with intent to break into a dwelling-house, constituted the offence contemplated, he directed the jury, if they believed that the prisoner had the stone in his possession with intent to use the same for the purpose of effecting a felonious entry into the house of the prosecutor, to find a verdict of guilty. The jury having returned a verdict of guilty against the prisoner, the Assistant-Barrister postponed giving judgment until the following question should be decided by this Court, namely, Whether under the circumstances detailed in the evidence, the prisoner was properly convicted of the offence created by the first section of the statute, and whether judgment ought to be passed upon him under the same?

M. T. 1851.
Cr. Appeal.
 THE QUEEN
 v.
 BURKE.

The *Attorney-General (Hatchell)*, and *J. Perrin*, on behalf of the Crown.

The indictment in this case is framed under the statute 14 & 15 Vic. c. 19, an Act for the better prevention of offences. The first section enacts—"That if any person shall be found by night armed
 "with any dangerous or offensive weapon or instrument whatsoever,
 "with intent to break or enter into any dwelling-house or other
 "building whatsoever, and to commit any felony therein, or if any
 "person shall be found by night having in his possession, without
 "lawful excuse (the proof of which excuse shall lie on such person),
 "any pick-lock key, crow, jack, bit or other implement of house-
 "breaking; or if any person shall be found by night having his
 "face blackened or otherwise disguised, with intent to commit any
 "felony; or if any person shall be found by night in any dwelling-
 "house or other building whatsoever, with intent to commit any
 "felony therein, every such offender shall be guilty of a misde-
 "meanour," &c.

The stone used by the prisoner was clearly a dangerous and offensive weapon within the meaning of that statute.—[PERRIN, J.

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The question was not left to the jury whether it was a dangerous instrument as charged in the indictment. "Armed with a dangerous instrument" must mean one dangerous to the person. The charge therefore does not come within that portion of the section. These Acts must be construed strictly.]—In *Rex v. Grice* (a), on an indictment under the Poaching Act, 9 G. 4, c. 69, which makes it penal for any persons unlawfully to enter land to destroy game, being armed with any gun or offensive weapon, it was proved that the prisoners had brought with them large heavy smooth stones, and had thrown them at the game-keeper; the Judge left it to the jury to say whether the stones were of such a description as to be capable of inflicting injury to the person if used offensively, and if so, they ought to find the prisoner guilty of being armed with an offensive weapon.—[MONAHAN, C. J. Does the word "dangerous" not apply to an instrument used against the person, as contradistinguished from crow, jack and other instruments mentioned in the succeeding part of the section?—BALL, J. The Act contemplates two purposes, the breaking into the house, and committing a felony therein; if the construction suggested be right, it would confine it to one purpose only.]—*Rex v. Fry* (b); *Rex v. Johnson* (c).

No Counsel appeared on behalf of the prisoner.

BLACKBURNE, C. J.

The Assistant-Barrister appears to have assumed that the stone was a dangerous weapon within the meaning of the statute—thus leaving it to this Court to decide what ought properly to have been left to the jury. Besides, there was no evidence of the felonious intent averred in the indictment. The conviction therefore cannot be sustained, and the prisoner must be discharged.

(a) 7 C. & P. 803.

(b) 2 M. & Rob. 42.

(c) R. & Ry. 492.

M. T. 1851.
Cr. Appeal.

THE QUEEN *v.* HIGGINS.

Dec. 20.

THIS was a case reserved from the Quarter Sessions of the County of Wexford, held before P. J. Blake, Deputy Assistant-Barrister, on the 18th of October 1851.

The case stated that the indictment was brought under the statute, for rescuing sheep distrained for poor-rates alleged to be due out of the commons of Bantry in said county.

At the trial there was given in evidence on the part of the prosecution the rate-book, whence it appeared that a rate was made by the Vice-Guardians of the Union on the 29th of September 1849; and a warrant directed to James Long, a poor-rate collector for said division, dated 29th of September 1849, signed by the Guardians, and countersigned by their clerk. The warrant was in form a book, and in the succeeding pages of the book the names of the persons rated, the sums payable by them, and the gross amount were entered. It was also proved that the persons whose names were subscribed to the rate-books as Vice-Guardians had acted as such at the time the rate was made. The poor-rate collector proved that he went to the lands described in the rate-books as the commons of Bantry, Nos. 480, 481, and on the 19th of September 1851 levied, as a distress for £17, specified in the book as payable out of the commons of Bantry, ten sheep which were grazing on the land, and that the traverser rescued them. That the commons of Bantry were a large open common, but the place where the seizure was made was not open, but an inclosed part of the common; it was not, however, separated from the road by any fence.

The warrant was as follows:—

“NEW ROSS UNION.

“To Mr. James Long, collector of poor-rates for Templedigan
 “division of said union.

“You are hereby authorised and directed to levy the several poor-
 “rates and arrears of poor-rates in the annexed book set forth, from
 “the several persons therein rated, or other persons liable to pay the
 “said rates and arrears of rate.”

Where in a rate-book, under the Poor-law Acts, the rated person was under the head “Occupiers” described as representatives of P. K., *Held*, that such description was *prima facie* good; and any objection to the rating could only be taken advantage of by appeal from the rate.

Held also, that this Court can only deal with questions of law arising out of the facts stated.

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THE QUEEN
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The rate-book contained twelve columns in the following form :—

NEW ROSS UNION—'TEMLEDIGAN ELECTORAL DIVISION.

A Rate for the Relief of the Poor of the New Ross Union, in the Counties of Wexford, Kilkenny and Carlow,
made the 29th of September 1849.

No.	Name of Property Rated.	Description of Property.	Estimated Extent.	Net Annual Value.	Occupier.	Immediate lessor of hereditaments not exceeding £4.	Immediate lessor of hereditaments under agreement.	Rate.	Arrear.	Total.
480	Commons of Bantry.	Land	A. R. P. 1514 0 0	£ s. d. 114 0 0	Reps. of T. Kavanagh	Ditto		£ s. d. 18 12 0		
481	Bantry Commons	Land	545 3 22	10 0 0	Reps. of T. Kavanagh	Ditto				

The case for the Crown having closed, Counsel for the traverser submitted that an acquittal should be directed, on the ground that the warrant was not according to the form required by the Act, because it did not contain and specify within itself the gross amount to be collected. Secondly, that the rate was illegal, and had not been properly struck, inasmuch as the representatives of T. Kavanagh were stated in the rate-book as occupiers, and that such was not true; and even if true, the description of the occupiers in the book was insufficient.

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Cr. Appeal.
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The Assistant-Barrister refused to direct an acquittal, and the traverser examined a witness who proved that Kavanagh or his representatives did not occupy or claim any estate or interest in the commons of Bantry since the year 1844; that the premises were grazed by the cattle belonging to the inhabitants of the barony of Bantry, and that portions of the commons were inclosed by the inhabitants.

It having been agreed to reserve the points for the opinion of this Court, the Assistant-Barrister directed the jury to assume that the warrant was sufficient, that the rate was legal, and therefore the cattle were in legal custody. The jury found the traverser guilty, and the sentence was deferred until the decision of this Court should be ascertained.

D. Lynch and *M. O'Donnell*, for the traverser.

There are two questions raised for the consideration of the Court. With respect to the first—whether the warrant of the collector was bad in point of form, that objection is not now relied on.

With regard to the second question, we contend the rate is illegal, the description being insufficient, and there being no evidence that the persons named in it were occupiers. There is evidence *contra*, that they had nothing to do with the commons since 1844.—[BLACKBURN, C. J. We are not to draw inferences from the facts, we are to decide the question of law.—LEFROY, B. Is not the land bound unless the rate be appealed from and reviewed? What is the meaning of the Act giving an appeal, and saying in the meantime the rate is to be collected?—The rate is on the occupier, not on the land. We admit the lands are liable, but it must be shown that

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 v.
 HIGGINS. the rate was regular. The 61st section of 1 & 2 Vic. c. 56, enacts, that the Guardians shall levy such rates as may be necessary on every occupier of rateable hereditaments, so that the rate is to be made on persons in respect of premises occupied by them; it is therefore a rate not on the land but on the occupier. Then the 65th section provides that the particulars of every such rate shall be entered in a book, and this book shall be evidence of the truth of every particular contained therein: *The Guardians of the Castlebar Union v. Lord Lucan* (a). The 6 & 7 Vic. c. 92 amends that Act; and by the first section it provides that if at the time of making any rate, the name of the immediate lessor be not accurately known to the persons making the rate, it shall be sufficient to describe him therein as the immediate lessor, with or without any name or further addition; but there is no such provision as to occupiers. Here the occupiers are described as the representatives of T. Kavanagh. That is an ambiguous description—it is not possible to know whether they be the representatives of the real or personal estate of Kavanagh. Here the party is sought to be made liable for the debt of another, and he ought to know to whom he should look for redress.—[LEFROY, B. When he puts cattle on land, does he not know whose land it is?—PERRIN, J. This is matter of appeal; why did he not appeal?—LEFROY, B. In *Lord Lucan's case*, if the land had been distrained the question would not have arisen.—PERRIN, J. You must go the length of showing that the person rated was not truly named—the description does not affect the traverser; if aggrieved, why did he not appeal?—He could not appeal, not being in privity with the lands at all. It is open to us to show we were not occupiers.—[BLACKBURN, C. J. That question is not reserved for our consideration. How are we to decide a question of fact?—LEFROY, B. The Act giving the Court jurisdiction does not allow a party to come here and raise a question which the Judge has not reserved.]—In *The Queen v. Pigott* (b), a traverser was allowed to impeach the validity of a county cess. We say the rate is erroneous in point of fact.—[BALL, J. The 6 & 7 Vic. c. 92, s. 10, repeals the form prescribed by the former Act (1 & 2 Vic. c. 56); and in the new form the column is headed "Occupier," not "Name of

(a) 13 Ir. Law Rep. 44.

(b) 1 Com. Law Rep. 471.

occupier," as in the former—leaving it open to the inference that a description of the occupier is sufficient.]—*Governors of the Poor of Bristol v. Wait* (a). M. T. 1851.
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The *Attorney-General* and *J. Perrin* (with whom were *Harris*) were not called on.

BLACKBURN, C. J.

The Court are of opinion that the rate is on the face of it valid; and any objection to it should have been taken by an appeal against it. On the other question we have no jurisdiction. Cases brought before this Court should be stated in such a form, and the evidence so set out, as that the matter of fact raising the question of law may distinctly appear. We can but deal with the abstract question of law.

Conviction affirmed.

(a) 1 A. & E. 264; S. C. 10 Q. B. 868.

THE QUEEN v. WESTROPP and HURLEY.

Dec. 20.

THIS was a case reserved from the Quarter Sessions of the County of Clare, held before William Major, Assistant-Barrister, on the 15th of October 1851.

The case stated that the traversers were convicted on an indictment charging them with having, on the 21st of July 1851, rescued a distress seized by a collector of poor-rates, payable to the Guardians of the poor of the Scariff Union, out of the lands of Fortanne in said county. Evidence was given of the making of the rate on the 15th of January 1850, and the issuing of the collector's warrant on the 30th of May 1851. The designation of the occupier in the rate-book and the warrant was J. Westropp, and it was admitted he died in September 1850. Two objections were raised on behalf

Traversers were indicted and convicted for rescuing goods and cattle distrained for poor-rates. In the rate-book and warrant the occupier was described as "J. Westropp;" and evidence was given that J. Westropp had died previous to the issuing of the warrant, though living at the time the rate was struck.

Held, that such conviction was right, the occupier being sufficiently described by the initial letter of his Christian-name, and the rate being leviable, notwithstanding the death of the occupier; under 6 & 7 Vic. c. 92, the rateable hereditaments were still liable.

M. T. 1851.

*Cr. Appeal.*THE QUEEN
v.

WESTROPP.

of the traversers; first, that the rate was void, the occupier being designated by an initial letter in the rate-book and the warrant, and also because the person originally rated was continued as occupier in a warrant made after his death. These objections the Assistant-Barrister reserved for the opinion of the Court.

Sir *C. O'Loghlen*, for the traversers.

First, it is submitted that the party rated as occupier should be described in the rate-book and warrant by his full name.—[MONAHAN, C. J. Is there any authority to show that a description of a person in a rate-book by his initial name is not sufficient? Questions as to initials have arisen on a point of pleading, but it is now sufficient in pleading to describe a person by initials.]—

Then on the other question. The warrant is inoperative, having been made after the death of the party rated. The 71st section of 1 & 2 Vic. c. 56, enacts, that every rate made under the authority of this Act shall be paid to the person authorised to collect the same by the person in the actual occupation of the rateable property, at the time of the rate being *made*, and on his default, by the person subsequently in the occupation of the rateable property. No such default occurred here, inasmuch as the rated occupier died before the rate was collected; *Stevens v. Evans* (a).

The *Attorney-General* and *J. Perrin*, on the part of the Crown, were not called on.

BLACKBURN, C. J.

The decision pronounced in the last case rules the first point reserved in this one. With regard to the second point, the 6 & 7 Vic. c. 92, s. 6, enacts that it shall be lawful to distrain all goods and chattels, to whomsoever the same may belong, found on any premises in respect of which any person is or shall be rated as occupier; it is plain therefore that although the person rated dies, that section enables the collector to levy off the lands, no matter to whom the property thereon belongs.

Conviction affirmed.

(a) 1 W. Blac. 283.

H. T. 1852.
Common Pleas.

JOHN HENDERSON,

Administrator of JOHN HENDERSON, deceased,

v.

JOSEPH LEYCESTER.

MARY MASON, Administratrix of JOHN MASON, deceased,

v.

SAME.

ELIZABETH DOYLE, Widow, and Administratrix of

HENRY DOYLE, deceased,

v.

SAME.

(*Common Pleas.*)

Jan. 19.

J. D. FITZGERALD moved that the proceedings in two of the above causes might be stayed, and that one only of the said causes be proceeded with, or that the said three causes might be consolidated; and also that the defendant might be at liberty to amend his pleas in the said several causes, or in such of them as should be prosecuted, by pleading in denial of the averments in the declarations respectively, that the said plaintiffs have not respectively obtained administration as therein stated.

The above actions were brought under the provisions of the statute 9 & 10 *Vic. c. 93* (Lord Campbell's Act), against the defendant, as the owner of the *Minerva* steamer, to recover compensation for the deaths of three of the crew of the *Rushton* brig, which, it was alleged, had been run down by the steam-vessel *Minerva*, on the 19th of August 1850, and several of her seamen lost. The affidavit of the defendant stated that he had searched the records of the Prerogative Court, and that no letters of administration appeared to have been granted to the plaintiffs respectively. The

Where three separate actions were brought under the 9 & 10 *Vic. c. 93* (Lord Campbell's Act), by different plaintiffs against the same defendant, the Court refused a rule to consolidate the actions, or to stay the proceedings in two of them to abide the result of the third.—*Sem-ble.* The object of the 3rd section of the above statute was, to prohibit different actions being brought in respect of the same casualty to the same

person; not to prohibit the representatives of each person from maintaining a separate action.

H. T. 1852.
Common Pleas.
 HENDERSON
 v.
 LEYCESTER.

declarations in the present cases were all filed by the same attorney ; and the cause being at issue, notice of trial was served for the 26th of November 1851, but was afterwards withdrawn.

J. D. Fitzgerald, for the defendant.

The true construction of the 9 & 10 Vic. c. 93, is, that only one action is to be brought in respect of one act of negligence or default. The first section of the statute provides that where any wrongful act or neglect, terminating in death, shall occur, an action shall be maintainable against the person through whose negligence such accident occurred. The second section enacts that every such action shall be brought in the name of the executor or administrator of the person deceased, and shall be for the benefit of the wife, husband, parent and child of the deceased. And by the third section it is enacted that not more than one action shall lie for and in respect of the same subject-matter ; and that every such action shall be commenced within twelve months after the death of such deceased.—[MONAHAN, C. J. Is not the meaning of the third section this—that only one action shall be brought in respect of the same death?]—No ; the second section provides that every such action shall be for the benefit of the wife, husband, parent and child, which would on that construction render such a provision as that contained in the third section unnecessary.—[MONAHAN, C. J. May not the damages in the different actions be different, and how are they to be assessed ? or, suppose an action brought by one person who suffers from the accident, and judgment recovered, would it not be competent to the other parties or their representatives to bring another action ?]—It cannot have been intended that if there were three hundred persons who suffered from the accident, they should all be entitled to institute separate actions, the result of which might be to ruin the defendant. In the case of *M'Evoy v. The West of England Insurance Company (a)*, where the plaintiff had insured in three separate offices, and brought three actions, the Court of Exchequer made a rule consolidating the actions, the defendants agreeing that the verdict in that action should bind them without binding the plaintiff.—[MONAHAN, C. J. In that case there was no difficulty as to damages.]—Our

(a) 4 Ir. Jur. 129.

affidavit states that the plaintiffs in these actions are not the personal representatives of the parties of whom they profess to be.—
[MONAHAN, C. J. If we were to stay the present actions on that ground, no other action could be brought, the year having expired.]

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Common Pleas.
HENDERSON
v.
LEYCESTER.

Fitzgibbon, with whom was *Hayes*, for the plaintiffs.

The Court have no jurisdiction, independent of the statute, to stay the present action, there being no connexion between the plaintiffs. In *Nicholls v. Lefevre* (a), where two actions had been brought against the same defendants by different plaintiffs, the Court refused to order the proceedings in five of them to be stayed to abide the result of one, although it was sworn that the causes of action were different in all of them; and the Court observes:—
“As it is sworn that the causes of action are different, and that the witnesses are different, we cannot interfere.” The latter clause of the third section shows that the construction of the statute contended for by the plaintiffs is correct; for the period limited for bringing the actions, being computed from the time at which the death has occurred, may vary in different cases.

Napier, in reply.

MONAHAN, C. J.

We have no doubt whatever as to the construction of this statute. It is quite clear that the meaning of the third section is, that there are not to be several actions on account of the one death; that is to say, that there is not to be one action by the mother of the deceased, another by the daughter, another by the wife, and so on; but that it was not intended that there might not be several actions, by the several personal representatives of the different persons, whose deaths occurred in consequence of the same accident.

It is not necessary for us now to express any opinion upon the point as to whether the Court has the power in its discretion to consolidate these actions; but where three actions brought by different plaintiffs, and in which different witnesses may be ex-

(a) 3 Dowl. P. C. 135.

H. T. 1852. *Common Pleas.*
HENDERSON
v.
LYCESTER. amined, are to be tried at the same After-sittings, we do not think we ought to interfere now by staying the proceedings, as it might be the means of delaying the ascertainment of the rights of the parties. In cases of insurance, there could be no difficulty as to the amount of damages to be assessed, but in this particular case, if there were judgment by default in two of the actions to abide the event of the third, still the necessity for an assessment of damages by a jury would remain. The application to stay the proceedings must therefore be refused; neither do we think we should now allow the defendants to plead the want of letters of administration. If they had done so in the first instance, the defect might have been remedied. It is now too late.

TORRENS, J., concurred.

JACKSON, J.

We are not now laying down any general rule as to our power to consolidate actions; we are merely acting upon the particular circumstances of this case, in which the party applying is not entitled to rely upon his construction of the statute.

Motion refused, with costs.

LONGFIELD *v.* YOUNG.

Jan. 14.

In granting oyer under the 89th General Order, it is not sufficient to furnish certified copies of the documents merely. If the opposite party require to compare them with the originals, he should be permitted to do so.

BERNARD BAGOT (with whom was *Meagher*) moved that the rule entered in this cause for liberty to lodge oyer of certain deeds, dated respectively the 5th of October 1820, and 11th of April 1830, be set aside, on the ground that it had been irregularly obtained without

Semble—If the opposite party do not require to compare the copies furnished with the originals, oyer will be complete on delivery of certified copies.

any complete tender of oyer, and without allowing the defendant's attorney to inspect or compare the copies lodged, with the original, and without any refusal by the defendant to pay for the same. The declaration in this case, which was in covenant, for rent, was filed on the 30th of December 1851; and on the 3rd of January 1852, the defendant's attorney entered and served the rule for oyer. The affidavit of the defendant's attorney stated, that on the 7th of January, a clerk in the plaintiff's employment attended at the office of the defendant's attorney for the purpose of giving oyer, and offered him copies of the deeds, on his paying the costs of oyer; that the defendant's attorney stated upon that occasion that he was willing to pay whatever should be the costs of oyer, but before doing so should require to inspect the original deeds, and compare them with the copies. That the clerk informed him that he had not the deeds then; upon which the defendant's attorney arranged to call at the office of the plaintiff's attorney that evening, and compare the deeds. That having called accordingly, the plaintiff's attorney directed him to call again upon the following day, and the defendant's attorney having attended at that time, saw the same clerk, who again offered the copies, stating that the plaintiff's attorney had not left out the originals. That the defendant's attorney declined to accept the copies without comparing them with the originals; upon which the clerk appointed four o'clock upon that day for the purpose. That on the defendant's attorney calling then, he was informed that the deeds had been lodged in Court. The affidavit of the plaintiff's attorney stated that he believed the rule for oyer was entered for the purposes of delay, and that the defendant had no meritorious defence to the action; that the copies were certified by him pursuant to the rules of the Court; and that he believed the defendant's attorney, at the time he demanded inspection of the original deeds, had no intention of paying the costs of oyer, but that he expected to obtain sufficient knowledge of the deeds by reading and comparing them.

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Common Pleas.
 LONGFIELD
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 YOUNG.

Drury, for the plaintiff, in support of the rule.

It is submitted that oyer is, according to the practice of the Court,

H. T. 1852. completed by furnishing the party requiring it with a certified copy
Common Pleas. of the document, pursuant to the 89th General Orders ; or, at all
 LONGFIELD events, that before a party obtains oyer, he is bound to tender to
 v. the party giving it the costs of such oyer.
 YOUNG.

Meagher, in reply, cited *Sterne v. Mooney* (a).

MONAHAN, C. J.

We think this motion must be granted. The 89th General Rule provides that the party seeking oyer shall be at liberty to inspect the instrument, and compare the copy therewith ; and therefore, we are of opinion that the granting of oyer is not completed until this inspection and comparison takes place, if the party seeking oyer requires such comparison and inspection. If the party seeking oyer accepts the copies, and does not require an inspection or comparison with the original, such acceptance of the copies may be considered as rendering the grant of oyer complete. If after entering the rule for oyer, and putting the opposite party to the expense of preparing copies, he should afterwards decline to accept it, or pay the costs occasioned thereby, under the 90th Rule, the party giving oyer may enter a rule to lodge oyer with the Master, and he may then serve that rule and tax his costs of oyer. But before entering that rule, the tender of oyer should be complete. Here we think this was not so, because the party required to see the original deeds. We therefore are of opinion that the plaintiff was not justified in entering the rule in question.

TORRENS, J., and JACKSON, J., concurred.*

(a) 12 Ir. Law Rep. 47.

* BALL, J., *absents*.

H. T. 1852.
Common Pleas.

HEARNE v. HAYDEN.

Jan. 19.

LAWSON moved that the plaintiff be at liberty to enter a suggestion on the record, for the purpose of having the issue tried in the county of the city of Dublin, being the venue in the original action, and not in the Queen's County, where the writ of *scire facias* was directed to, and where the defendant resided. The Court of Exchequer have decided, in *Brew v. O'Brien* (a), that where a writ of *scire facias* is directed, under the 171st General Order, to the Sheriff of the county where the party resides, against whom it is sought to revive a judgment, the Court will allow a suggestion to be entered upon the record, for the purpose of having the trial in Dublin.—

[MONAHAN, C. J. Ought not the suggestion to state some reason for changing the venue?—TORRENS, J. Why should not the issue be tried where the Rules direct the writ of *scire facias* to be directed, that is, in the county where the defendant resides?]

In *scire facias* the Court will not allow a suggestion to be entered on the record, for the purpose of changing the venue, unless upon an affidavit, showing that the trial can be more conveniently had in some other place.

MONAHAN, C. J.

We have considered this application, and also the decision of the Court of Exchequer in the case of *Brew v. O'Brien*; and with every respect for that Court, we do not feel that we should be justified in following the decision. We are all of opinion that we are not authorised to allow a suggestion to be entered upon the record for the purpose of changing the venue, unless it appears that the action could be more conveniently tried in the place to which it is sought to change the venue. In the present case no grounds whatsoever have been shown, no affidavit has been made, and the motion must therefore be refused. We must not be understood as giving any opinion where the case is properly to be tried; all we decide is that if, as the pleadings stand, the case should be tried in the country, we will not change the venue merely for asking, without laying any grounds for the application before the Court.

Jan. 22.

(a) *Supra*, p. 159.

H. T. 1852.
Queen's Bench

MICHAEL MORIARTY v. TIMOTHY MORIARTY,
 Administrator of TIMOTHY MORIARTY.

(*Queen's Bench.*)

Jan. 12.

Where an action is brought against an administrator, and pending that action a cause petition is filed to administer the assets of the deceased, the Court, under the provisions of the Chancery Regulation Act, stayed the proceedings; but in such case the costs of the proceedings at law will not be allowed.

FRANKS moved, on behalf of the defendant, that, under the provisions of the Chancery Regulation Act, all further proceedings in this suit be stayed.

The writ in the present action was served on the 6th of May last; an appearance was entered thereto on the 17th of June following; and a declaration was filed on the 15th of December. A cause petition, wherein Samuel Lindsay, assignee of John Tuite, was petitioner, and Timothy Moriarty respondent, to administer the assets of Timothy Moriarty (deceased), was filed, under the 15th section of the Chancery Regulation Act, on the 15th of November, and a summary order was obtained thereon on the 27th of November. A notice requiring the plaintiff to stop was filed on the 20th of December, and the defendant, on the 24th of December, pleaded to the declaration, to prevent judgment being marked for want of plea.

By the 22nd section of 13 & 14 Vic. c. 89 (Chancery Regulation Act), the defendant is entitled to the order now sought. That section enacts, "That after the Court has made any order under the
 "Act, referring to the Master any petition with respect to the admi-
 "nistration of the real and personal, or of the personal estate of any
 "deceased person, or after a decree or order has been made by the
 "Court in any suit referring to the Master the matter of any such
 "administration, it shall not be lawful for any creditor or other per-
 "son, so long as any such order as aforesaid remains in force, to
 "commence or proceed with any action against the executor or
 "administrator of such deceased person, or against his heir or de-
 "visee in the case of real estate so to be administered, for any debt

“or demand claimed against the estate of such deceased person,
 “without the leave of the Master, in writing, first obtained in that
 “behalf; and it shall be lawful for any Judge of the Court, in
 “which any such action is pending, to order that all further pro-
 “ceedings in such action be stayed until after such leave as
 “aforesaid of the Master has been obtained, and to make such
 “order as to the costs of any such action as to such Judge ap-
 “pears just.”

H. T. 1852.
Queen's Bench
 MORIARTY
 v.
 MORIARTY.

De Moleyns, contra.

We admit the defendant is entitled to this order, but having lain by so long, and the plaintiff having no notice of the order made on the petition until the 20th of December, he is entitled to the costs of those proceedings at law: *Vernon v. Thelusson* (a). They should have tendered us a consent to pay the costs up to the day of notice of their motion.

Franks, in reply.

Under the old practice the costs were considered as attached to the creditor's demand.

Per Curiam.

We will stay the proceedings, the defendant paying the costs of this motion, he having taken a step after notice of the filing of the petition. We give no costs of the proceedings at law, as the action may be hereafter proceeded with.

(a) 1 Phil. 466.

H. T. 1852.
Queen's Bench

NERHENEY, in Replevin, and in six other cases,

v.

THE GUARDIANS OF THE ROSCOMMON UNION.

Jan. 16.

Where several suits grounded on the same cause of action were brought against the same defendant, the Court refused to consolidate the actions, but compelled the plaintiffs to select one, and ordered the others to abide the event of that suit.

O'HAGAN (with him *Meagher*) moved, on behalf of the defendants, to amend certain clerical and verbal errors in the avowries filed in the above actions, to which the plaintiffs had demurred specially, and also that the several actions might be consolidated.

Seven actions have been brought for the purpose of trying the legality of a distress for poor-rates. The same question is common to all those cases, and the event of one action will decide all : *Tomlinson v. Bollard (a)*. The demurrers taken and the avowries are precisely the same in each case.

Martley and J. Robinson, contra.

With respect to the amendments, they can only be allowed on payment of costs. On the other branch of the motion the Court have no jurisdiction. It is not the case of one plaintiff proceeding against several defendants, but of several plaintiffs against one defendant.

CRAMPTON, J.

This motion is divisible into two parts; the first is an application to amend the pleadings after a demurrer filed; secondly, to consolidate defences.

Seven replevin suits have been commenced, where one would have been quite sufficient to settle all questions in dispute. In strictness the parties had a right to bring these suits, but there is something like oppression in it; we however must dispose of it according to the practice of the Court. The defendants have committed a mistake in their avowries, and they now seek a favour in

(a) 4 Q. B. 642.

the shape of being allowed to amend. Under such circumstances we always compel the party to pay the costs.

H. T. 1852.
Queen's Bench

HERHENY
v.

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UNION.

On the second part of the motion we make no rule to consolidate, but the plaintiff must select one of the said actions, the other six to abide the event of that cause.

Per Curiam.

Let the defendants be at liberty to amend the avowries in these causes as they may be advised, and let the plaintiffs select one cause out of the seven in which to proceed; and let the proceedings in the six remaining causes be stayed, and abide the result; the defendants to pay the costs of the amendment and the costs of this motion.

MAUNSELL, in *Replevin, v. PURCELL.*

Jan. 16.

R. LANE, on behalf of the defendant, moved that the proceedings in this cause be stayed, the defendant undertaking to pay the plaintiff the costs in this cause when taxed and ascertained, and the costs of the distress and replevin; and further undertaking that the replevin bond be given up to be cancelled, or that the defendant be at liberty to bring in and lodge money in Court by way of compensation or amends for the taking of the goods in the declaration mentioned.

Proceedings in replevin stayed after avowries filed, upon payment of the costs of the action and distress, and costs of the application, and delivering up the bail bond to be cancelled, there being no special damage averred in the declaration.

The declaration was filed in last Hilary Term, and the defendant has put in the usual avowries. The action is grounded on an omission by the bailiff of the defendant, he not having inserted in his notice of distress his place of residence; the avowry consequently cannot be sustained. The declaration is in the general form, and does not assign special damage, the plaintiff cannot therefore be prejudiced by the granting of this order. In *Banks v. Bland* (a) a similar rule was made.

(a) 3 M. & Sel. 525.

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Queen's Bench
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J. Greene and *R. Armstrong*, on behalf of the plaintiff, did not resist the application, but submitted they were entitled to the costs of the motion.

Per Curiam.

Let all proceedings in this cause be stayed, and the replevin bond be cancelled. Let the defendant pay the plaintiff the costs of the proceedings and the costs of this motion.

MONTGOMERY and BRISTOW,
 Public Officers of the Northern Banking Company,

v.

BYRNE.

M. T. 1851.
 Nov. 6, 13.

In the condition of a bond, reciting that the defendant kept an account with, and discounted bills of exchange and other securities with, a Banking Company, was contained an

MACDONOGH (with him *E. Blackburne*), on behalf of the defendant, moved that he be discharged from custody from the writ of *capias ad satisfaciendum* which had issued in this cause, and that the writ and the committal be set aside, on the ground that the execution was issued improvidently and contrary to law, and without any suggestion of breaches or inquiry of damages, contrary to the 9 *W. 3, c. 10*.

agreement that if W. B. (the defendant) and A. G., or either of them, their heirs, &c., should satisfy and pay such sums of money as they might be indebted in to the Banking Company for advances, then the bond was to have no effect; and there was also a proviso, that it might be lawful for the Banking Company to enter judgment on the bond by virtue of a warrant of attorney, and sue out execution on said judgment for the amount of such sums as should appear by the books of the Company to be due and owing by the obligors or either of them, without filing any suggestion of breaches upon the bond. The defendant was arrested on a *ca. sa.*, issued on foot of a judgment so entered, without any suggestion of breaches being filed.

Held, that the execution was irregular, such case coming within the provisions of the statute 9 *W. 3, c. 10*, and requiring a suggestion of breaches.

Held also, that the provisions of the statute are mandatory, and cannot be waived by agreement between the parties.

Delacour v. Murphy (13 *Ir. Law Rep.* 195) followed.

The defendant had been arrested on a judgment marked on a bond, with warrant of attorney, in the penal sum of £4800. The bond bore date the 28th of September 1842. By the condition, after reciting that William Byrne and one Arthur Gaffikin had theretofore kept an account with the Northern Banking Company, and had discounted with them bills of exchange and other negotiable securities, and had received advances from them, so that there was then due and owing by William Byrne and Arthur Gaffikin to the Banking Company a considerable sum of money; and also that the Banking Company had for some time past held, and then held, certain title deeds of certain properties belonging to William Byrne and Arthur Gaffikin under an equitable mortgage, as a security for any balance which might become due to the Banking Company by William Byrne and Arthur Gaffikin in their dealings with each other; it was agreed and declared that if William Byrne and Arthur Gaffikin, or either of them, or the heirs, executors or administrators of them, or of either of them, should and would from time to time, and at all times thereafter, well and truly satisfy and pay, or cause to be paid, on demand, unto the Northern Banking Company all and every such sum and sums of money as they the said William Byrne and Arthur Gaffikin, or either of them, or their respective executors or administrators, then were or was, or should, or might, at any time thereafter be indebted in or owe, or be or become liable for the payment of, to the Banking Company, for, by reason or on account of any advance then made, or thereafter to be made, by the said Company to William Byrne or Arthur Gaffikin, or either of them, or at the instance or request of them, or on foot of any draft or drafts, bill or bills of exchange, promissory note, or other securities, which the Banking Company had already accepted, discounted or paid, or should or might thereafter accept, discount or pay, on account of William Byrne and Arthur Gaffikin, or either of them, or in or for which William Byrne or Arthur Gaffikin, or either of them, either upon their own proper account, or upon the account of them or either of them jointly with any other person or persons whomsoever, then were or was, or should by any means howsoever become indebted in, be or

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become liable for the payment to the Banking Company, together with interest.

Provided always, and it was thereby declared, that it should and might be lawful for Hugh Montgomery and James Bristow, their executors, administrators or assigns, at any time thereafter, to enter up judgment or judgments against William Byrne and Arthur Gaffikin jointly or severally upon said bond or obligation, by virtue of the warrant of attorney for that purpose, and to sue out execution or executions upon said judgment or judgments for the full amount of such sums of money as should appear by the books of the Company to be due and owing by William Byrne and Arthur Gaffikin, or either of them, or their heirs, executors or administrators, to the Company, *without filing any suggestion of breaches upon the said bond or obligation, or upon any judgment that might have been entered thereon, or taking any inquiry to ascertain the sum really due to the Company by William Byrne and Arthur Gaffikin, or without issuing any scire facias to revive said judgment.*

On this bond judgment was entered in 1847, and on this judgment execution was issued, and the defendant arrested thereunder.

Macdonogh.

The practice is quite settled, that on a bond similar to the present the obligee is bound to enter a suggestion of breaches before issuing execution. This is not a mere money bond; for the amount for which the execution issued consists of a variety of sums, for interest, discount and other transactions between the parties. With regard to the proviso in the bond that the plaintiff may issue execution without suggestion of breaches, it has been decided that the provisions of the statute 9 W. 3, c. 10, being mandatory, their effect cannot be waived by any agreement of the parties: *Delacour v. Murphy* (a); *Hurst v. Jennings* (b).

But it is contended that because the defendant, after his arrest, filed a petition in the Insolvent Court for his discharge under the Insolvent Act, in the schedule to which petition he inserted the

(a) 13 Ir. Law Rep. 195.

(b) 5 B. & C. 650.

actual amount claimed by the plaintiffs as the sum for which he was detained in custody, adding in the margin of the schedule that this claim was disputed, is an admission of the debt. But that schedule can be no admission, because it was filed under certain circumstances to enable the defendant to obtain his discharge from custody on giving bail, and because it was also qualified by the observation in the margin, that the debt in question was disputed.

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Martley and W. C. Dobbs, contra.

This is not a case for a suggestion of breaches; the facts bring it directly within the authority of *Gorman v. Hinks* (a), which has not been overruled. That case went further than the subsequent cases, but it is in accordance with the English authorities. The case of *Green v. Sheil* (b) was decided on the different wording in the English and Irish statutes; but was overruled by *Gorman v. Hinks*, establishing that the statute contemplated an adverse suit. Where the bond is a mere money bond to be void on payment of a precedent debt, it is not a bond within the statute. *Stratton v. Codd* (c) was the first case impugning the authority of *Gorman v. Hinks*, but the judgment in that case fully bears out the position that where the bond is a mere money bond, a simple matter of computation, it is not a case for a suggestion of breaches. *Hurst v. Jennings* is expressly put on the ground that the judgment was obtained by a contrivance devised to evade the statute. When the damages are unliquidated there must be a suggestion of breaches, but in the case of a simple money payment that is not necessary.—[CRAMPTON. J. Suppose this were not the case of a judgment on a warrant of attorney, but that an action had been brought on the bond, and a judgment was had by default, would the conuzee then not be compelled to go before the Prothonotary of the Court to ascertain the amount due?—BLACKBURN, C. J. This is not a case of simple arithmetical computation, there is a recital of a course of dealing in which there may be computations of interest and compound interest.]

Assuming it is a case within the statute requiring a suggestion,

(a) *Batty*, 527.

(c) 9 *Ir. Law Rep.* 1.

(b) *J. & Bou.* 214, n.

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the proviso dispenses with the necessity for it. This case is distinguishable from the case of *Delacour v. Murphy*; there the parties entered into an agreement contrary to the very policy of the statute, and it was held by the Court of Exchequer that it would be in contravention of that policy to allow the plaintiff to dispense with an obligation which the law imposed on him; but here the defendant enters into a contract expressly intended for his own advantage, and solely for his benefit. The statute of *William* shows by its recitals that it was passed both for the benefit of plaintiffs and defendants.

Further, this motion is addressed to the discretion of the Court, and the defendant having filed his schedule admitting the debt, the Court will not now interfere in his favour.

E. Blackburne, in reply, was not called on.

BLACKBURNE, C. J.

This case comes within the principle of the decision of this Court in *Stratton v. Codd*. The case is one in which the customer of a Banking Company executes a bond to secure the payment of advances to be made to him. The Court, being aware that a dealing such as this is often of a complicated character, including charges for interest, discount and other matters of a mercantile character, are of opinion that it comes clearly within the meaning of the statute of 9 W. 3, c. 10, and see nothing in the case to distinguish it from *Delacour v. Murphy*, which establishes that it would be contrary to public policy to give effect to an agreement or contract nullifying the provisions of the salutary enactment of that statute.

As to the objection that the defendant, by filing his schedule, admitting this claim, has precluded himself from the interposition of the Court; it appears to us that the schedule was not filed under such circumstances as would prevent the defendant availing himself of this irregularity. We will therefore set aside the execution, the defendant undertaking to bring no action.

The plaintiffs thereupon issued a writ of *scire facias*, tested

31st December 1851. This *scire facias* recited the recovery of a judgment against the defendant, as of Trinity Term 1842, for the sum of £4800 and costs; that this judgment had been recovered upon a bond, bearing date the 28th of September 1842, in the penal sum of £4800, but under a certain condition [setting forth the condition as *ante*, p. 231]. The *scire facias* further stated that this judgment had been revived in Trinity Term 1850, and then set forth in a suggestion several breaches of the condition, and concluded with the usual command, to summon the defendant to answer why execution should not be awarded against him on the judgment for the damages to be assessed by reason of his breach of the said condition.

This writ was served on the defendant, endorsed as a suggestion of breaches. The defendant not having pleaded thereto, the plaintiffs marked judgment.

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Macdonogh (with him *E. Blackburne*) now moved that the said writ of *scire facias*, and all subsequent proceedings thereon, be set aside for irregularity, same having issued without any previous suggestion of breaches having been filed; and also because the same was informal, and contrary to the practice of the Court, a suggestion of breaches having been introduced in the writ.

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Jan. 15.

This writ is null and void. There are two writs of *scire facias* usually issued; first, a *scire facias* under the Statute of Westminster to revive a judgment more than a year old; secondly, a special *scire facias* under the statute 9 W. 3, c. 10. The 8th section of that latter Act, after reciting that, as the law then stood, if any action was commenced upon any bond, or other penal sum, for performance of covenants or other agreements in any deed or indenture, the party that brings the same could only assign one breach of covenant, enacts, that in all actions which shall be commenced in any of his Majesty's Courts of Record in this kingdom, upon any bond or bonds, or on any penal sum for non-performance of any covenants or agreements in any indenture or writing

Where a judgment was obtained by warrant of attorney on a bond conditioned for the payment of advances to a Banking Company, and a *scire facias* was issued thereon, suggesting in the body of the *scire facias* breaches of the condition, and judgment was obtained on this *scire facias* for want of plea, the Court refused to set it aside as irregular.

Semble—
Such objection would be good on demurrer, the statute 9 W. 3, c. 10, only authoris-

ing the embodying in the writ the suggestion of breaches where a previous suggestion had been filed on the roll of the judgment.

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contained, the plaintiff may assign as many breaches of the said covenants or agreements as he shall think fit; and thereupon the jury, on the trial of such action, are to assess not only damages and costs of suit, but also to give damages for such of said breaches as the plaintiff shall prove to have been broken. And if it shall happen that the defendant shall not plead to the issue, but judgment shall be given against him upon demurrer, or by *nil dicit*, *non sum informatus*, *cognovit actionem*, or the like; then, and in such case, it shall be lawful for the plaintiff to *suggest upon the roll of the* record in such action as many breaches of said covenants and agreements as he may think proper; upon which suggestion a writ is to issue to the Sheriff of the county where the action shall be brought, to summon a jury to appear before the Justices, &c., to inquire into the truth of each of those breaches, and to assess damages severally thereon; and that the Judge, &c., shall make a return of said writ, and the due execution thereof; which said writ shall be filed, and judgment shall be entered thereon, as in cases of writs of inquiry of damages. And in case the defendant pay into Court the damages so assessed by the jury, with costs, a stay of execution shall be entered; but if the damages do not amount to the penalty of the bond, such judgment is still to remain in force as a further security to answer damages to be sustained by further breach, as far as the remainder of the penalty reaches. Upon which breach the plaintiff shall be at liberty to sue forth a writ of *scire facias* upon the judgment, grounded upon suggestion of *other* breaches of the covenants or agreements *upon the roll of the judgment*, and thereupon to summon the defendant to show cause why execution should not be awarded upon the judgment; upon which there shall be the like proceedings as there was in the original action upon the bond for assessing damages, &c.

The mistake into which the plaintiffs have fallen is, that in proceeding under that statute of W. 3, they have not put themselves in a condition to issue a *scire facias* in the present form. Two courses were open to them: first, if they had a subsisting judgment, a simple suggestion of breaches should have been filed upon the roll of the record; but the plaintiffs, not having a subsisting judgment,

their course then was to issue a *scire facias* in the ordinary form to revive the judgment; and, having obtained judgment thereon, then to file a suggestion of breaches on the roll of the record of that judgment. Neither of these courses was adopted, but this special form of *scire facias* is had recourse to, which in no case could issue in a proceeding for breaches in the first instance, but only in the case of a proceeding for further breaches: 2 *Rich. C. P.* p. 285; *Tidd's Forms*, p. 203, 8th ed.—[MOORE, J. If in declaring on the bond, the plaintiff may at the same time assign breaches, what is the difference between assigning them in the declaration on the bond and suggesting them in the *scire facias*, which in this country is treated as a declaration?—According to the terms of the Act, when judgment is given against the defendant on *nil dicit*, as here, the plaintiff then is to suggest on the roll as many breaches as he shall think fit; but there is no provision for his issuing a *scire facias* until further breaches occur.—[PERRIN, J. Could they not have assigned these breaches in an action on the judgment? and if so, why may they not do so in the *scire facias*?—MOORE, J. If the statutable *scire facias* be intended to combine both, why should there be a *scire facias* under the Statute of Westminster?—It does not; for if but one month had elapsed after the first suggestion on the roll, a *scire facias* must issue, in which case a revival would not be necessary. In *Quin v. King* (a), Parke, B., says:—"There are two classes of cases contemplated by the statute—one, in which breaches may be assigned in the declaration—the other, in which they may be suggested on the roll; if they are assigned, the jury may assess the damages without a special *venire*; but when they are suggested, there ought to be a special *venire* to enable them." So here, to place them in a condition to file this *scire facias*, they ought in the first instance to have obtained judgment on the *scire facias*. In 1 *Saund.* p. 58, *f. h.*, it is stated in each case the plaintiff must suggest on the roll breaches of the covenants he seeks satisfaction for. The manner of doing it will, in some measure, depend upon what stage the proceedings are in at the time of the demurrer, or judgment by default. If the demurrer be to the

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declaration, or if the judgment by default be for want of a plea to the declaration, the plaintiff must make his suggestion in the form given when the plaintiff states the whole in his declaration. If any further breaches of covenant are committed, the Act directs that the plaintiff may sue out a *scire facias* upon the judgment. And again, in 2 *Saund.* p. 187, c, it is said :—"It seems, from the words of the "statute, that he may in a *scire facias* on the judgment state the "other covenants and assign breaches upon them;" and in note *g* it is remarked the plaintiff cannot, in the *scire facias* sued upon the judgment under the statute, suggest as a breach any thing which he might have originally assigned or suggested as a breach : *Harrap v. Armitage* (a).—[CRAMPTON, J. Why did you not demur to this *scire facias* ?]—The plaintiffs did not treat it as a pleading, but endorsed it as a suggestion of breaches ; and being irregular in that respect, the proper course is to move to set it aside for such irregularity. Further, in the ordinary *scire facias* the party is called on to show cause why execution should not be had on the judgment, which would thereupon put an end to the judgment had in the case ; it stands as a further security.

Martley and *W. C. Dobbs*, contra.

It is admitted that this proceeding would have been perfectly formal and regular if there had been a former suggestion of breaches, but the omission of that does not render the subsequent proceedings irregular.—[MOORE, J. In point of convenience it would appear to be the more desirable practice, for it would prevent the necessity of two trials.]—The distinction between the cases is this—when the breaches are anterior to the judgment, and not suggested in the declaration, they are then to be suggested on the roll ; but when subsequent, all must be suggested in a *scire facias*. The whole difficulty here arises from the decision of the Court in *Stratton v. Codd* (b), requiring a suggestion to be entered on a judgment obtained on a warrant of attorney. Before that case there was no settled practice on the subject ; but lately the practice was discussed in the Court of Exchequer in the case of *Morgan v. Steele*, and settled in

(a) 12 Pri. 441.

(b) 9 Ir. Law Rep. 1.

accordance with the practice here adopted. If breaches be suggested on the *scire facias*, that satisfies the terms of the statute, and the introduction of the word "further" was, in consequence of the practice in England being to assign breaches in the first instance in the declaration; whereas this being a judgment on warrant of attorney, no formal declaration is ever filed. In *Ethersey v. Jackson* (a), after oyer of the condition, and *non est factum* pleaded to debt on bond, on which issue was joined and notice of trial given, it was held the plaintiff might enter a suggestion on the roll and assign breaches; and the Court said that this statute required a liberal and beneficial construction, it being made in advancement of justice and in ease of defendants; showing it was manifest that the Legislature contemplated cases where the plaintiff had not originally assigned breaches in his declaration, which the statute enabled him to supply by entering a suggestion on the record even after judgment. At all events, if the objection be at all sustainable, the defendant ought to have raised it on demurrer.

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E. Blackburne replied.

BLACKBURNES, C. J.

The Court consider this is not a case calling for their interference. We therefore say—no rule, and no costs.

CRAMPTON, J.

This is a case of nicety, and I feel some difficulty in arriving at the same conclusion as the LORD CHIEF JUSTICE. I think there are inconveniences in the way of the practice we are called upon to adopt. It is the first time I have heard of incorporating two separate proceedings, save in the very case provided for by this special statute. There are two classes of cases in which breaches must be assigned or suggested; one when they are assigned before judgment, and the other when they are suggested after judgment. For by the 8th section, where the plaintiff brings an action on any bond or penal sum for the performance of covenants, he may

(a) 8 T. R. 255.

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assign as many breaches as he thinks fit; that is the first class of cases. Now undoubtedly a *scire facias* is under certain authorities treated as an action, but it cannot be considered an action on a bond; therefore I should say, no power is given by the statute to suggest breaches in the writ.

The second class of cases comprises those after judgment. There the plaintiff has power to suggest breaches on the roll. Now if any breaches be suggested here, they are not on the roll, they are suggested on a *scire facias*, not within the exigency of this statute; they therefore remain to be suggested on the roll. I should be disposed to think that, before execution issued, it would be necessary to enter a suggestion on the roll; the *scire facias* may be incorporated with the record, and so put upon the roll, but the suggestion is to be made upon an actual subsisting judgment; here there is no actual subsisting judgment. There is no use in introducing this matter on the writ; in my opinion it is only surplusage, and yet after judgment on this *scire facias* we are called on to set aside these proceedings. I think that is rather a strong motion. It is open to the defendant to demur, and therefore I concur in the rule that this motion cannot be sustained.

PERRIN, J.

It has lately been decided that cases like the present are within the statute of W. 3, and that breaches must be assigned on the judgment. Taking that decision to be the law, and abiding by it, what are the words of the statute? That in all actions on bond or penal sum for non-performance of covenants, the plaintiff may assign as many breaches as he pleases. The Court has ruled that *may* there is to be read as *must*; and that the provision of the statute is imperative on the plaintiff. I consider that the issuing the writ of *scire facias* amounts to bringing an action, and that action is brought for the purpose of inquiring why the plaintiff should not have execution on the judgment, bond or whatever else it may be, and to which the defendant may plead. But it is said in this country we have no declaration in *scire facias*; and that we should hold the true course to be, for the party to

issue the ordinary writ of *scire facias*, and then if he thought fit, to insert therein, as in a declaration, breaches, the rule being that there is no declaration, but that the *scire facias* should embody the whole declaration, and there is nothing in the statute to prevent his so doing. I should rather mark judgment, and then suggest breaches on the roll of the action of *scire facias* in conformity with the provisions of the statute. But the party has thought fit to incorporate the suggestion, and in so doing I cannot say that he has done any thing illegal or wrong. It appears to me the defendant has nothing to complain of, for the plaintiffs cannot obtain execution until they issue a *venire ad inquirendum*. I do not think we would be warranted in setting aside this *scire facias*.

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MOORE, J.

I concur in the judgment of the Court. It is not requisite I should give an opinion how far it is necessary to incorporate this with the *scire facias*. I entertain a difficulty with regard to that at present, and am inclined to think it cannot be done. The statute provides for three classes of cases:—First, where there is an action on the bond; there in the declaration there may be a suggestion of breaches: the next is where a party proceeds on a judgment in the first instance by a suggestion on the roll: and the third is, where, after a previous suggestion, he issues a *scire facias* to found a suggestion of further breaches. In my opinion the two may be incorporated when the proceeding is on a bond; but that cannot be done after judgment in a *scire facias*; however, I give no decided opinion on that point. The application here is to set aside the proceedings for irregularity. It is plainly impossible, however, that the plaintiff could proceed on the judgment without a *scire facias*; and although that may contain more than is necessary or warranted, I cannot come to the conclusion that it is a nullity in consequence of that. I concur with my Brother CRAMPTON in opinion that if the effect of this incorporation was to vitiate the writ, the course to correct that should have been by demurrer, instead of moving to set it aside for irregularity. I further think it is impossible for the plaintiffs to proceed to issue an execution until they have a trial and

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finding on the suggestion of breaches. The defendant therefore is not prejudiced, and consequently there is no foundation for setting aside the proceedings for irregularity.

No rule.

Afterwards, by reason of the opinion expressed by some of the Members of the Court that the suggestion of breaches in the *scire facias* was superfluous and a nullity, although it did not vitiate the writ, the following rule was, by consent of the parties, substituted for the original order:—

Let the judgment marked upon the *scire facias* in this cause be set aside, and let the plaintiffs be at liberty to amend the *scire facias* as they may be advised. Let defendant have two days time to plead to the *scire facias*, after notice served upon said defendant of such amendment; such plea to be to the *scire facias* as if in the common form, and not to raise any objection by said plea to its present form; and let defendant pay to the plaintiffs the costs of said judgment, and also the costs of this motion.

NOTE.—The plaintiffs amended the *scire facias* by striking out the suggestion of breaches, and the defendant pleaded payment. The case was tried at the Sittings after Term, and a verdict was found for the plaintiffs. The defendant was shortly after made bankrupt, and the case was not afterwards mentioned.

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BIRCH v. SIR WILLIAM SOMERVILLE.

Jan. 19, 24.

ASSUMPSIT, for goods sold and delivered, work and labour, and the money counts, brought by the plaintiff, a newspaper proprietor, against the defendant.

Plea—The general issue.

The action was tried before BLACKBURNE, C. J., at the Sittings after Michaelmas Term. On the part of the plaintiff, the Earl of Clarendon (the then Lord Lieutenant of Ireland) was called as a witness, and on being called, his Excellency came on the Bench by the side of the CHIEF JUSTICE; and the Registrar of the Court, in presence of the Counsel engaged for the plaintiff and defendant, and without any objection being made, administered to Lord Clarendon the ordinary attestation on honour, instead of the usual form of oath administered to a witness. His Lordship was examined and cross-examined by Counsel, and the admissibility of the evidence was unquestioned on either side at the time of its reception, or during the remainder of the trial. The jury found a verdict for the defendant.

A Peer having been examined and cross-examined on a trial without being sworn, and no objection being then made to the reception of his evidence:—*Held*, that it was too late to object to his testimony on motion for a new trial.

A conditional order having been obtained to set aside this verdict, on the ground of this evidence being illegally received, same having been given without the sanction of an oath—

Brewster (with him *J. Perrin*) showed cause.

It is admitted that a Peer of the realm must be sworn in an action between party and party, if so required: but this objection comes too late; the evidence was received unexcepted to, and if illegal, the time of its being given was the time to object to its admissibility: *Sells v. Hoare* (a). The plaintiff took his chance of a verdict, and any allegation of negligence or mistake on the part of the officer of the Court cannot now be regarded: *Allen v. Fran-*

(a) 3 Br. & B. 232.

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cis (a). In that case the Court refused to set aside an award, on the ground that the witnesses had been examined without being sworn, it appearing that the party objecting had called witnesses in support of his case, and examined them also not upon oath; the objection there was made at the time the witness was tendered for examination; and in *Abbott v. Parsons* (b), it was held that no objection to the applicability of evidence could be made unless the objection were taken before the Judge commenced his summing up; Tindal, C. J., observing:—"It is of the first importance to the administration of justice that objections of this kind should be made when the evidence is offered, and that the party should not lie by to speculate on the accidents of the cause."

There is no difference in this respect between parol and written evidence. Suppose the letter of a third person not a party to the action had been offered and received without objection, the plaintiff could not afterwards be heard to say he took his chance of a verdict; and that verdict being against him, then to apply for a new trial, on the ground of the admission of this evidence. In the note to *Sells v. Hoare*, in 2 *Tayl. Evid.*, p. 926, is the only suggestion in support of this motion. It is there said:—"Whether a party may obtain a new trial, if a witness on the other side has testified without having been sworn at all, *quære*. If the omission of the oath was known at the time, it seems he cannot:" *Hill v. Yates* (c). There the son of a juryman summoned and returned, having answered to his father's name when called on the panel, served as one of the jury on the trial, and it was held not to be a sufficient ground for setting aside the verdict. It is to be observed in the present case that the plaintiff makes no affidavit to ground his application, but has left that duty to his attorney, who states that Lord Clarendon was not sworn, that his evidence was most important, and went to the jury without the sanction of an oath; but he does not venture to allege that he was not apprised of that fact, or that he was not aware of it; he merely states that the evidence so received was illegal. If the objection to the attestation

(a) 4 D. & Low. 607, n.

(b) 7 Bing. 563.

(c) 12 East, 229.

had been made at the trial, it could have been at once removed; the plaintiff's Counsel were present at the time, and they must be taken to have acquiesced in its reception. But further, we have the plaintiff's own acquiescence; for in a newspaper, published by himself a few days after the trial, he thus writes:—"With respect to Lord Clarendon, we exhibited to him a courtesy he could not legally have claimed. We allowed him to speak on his honour instead of being sworn on his oath."

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Whiteside objected to this statement being made, as it in no way bound the plaintiff what was stated in a newspaper.

BLACKBURNE, C. J.

It is a declaration of the plaintiff himself, upon the very subject-matter of this motion.

Whiteside and *Meagher*, contra.

This evidence was a perfect nullity. A Peer cannot give evidence without being sworn: *Rex v. Lord Preston* (a); *Lord Shaftsbury v. Lord Digby* (b); *Meers v. Lord Stourtown* (c); *Lady Shrewsbury's case* (d); *Lord Lincoln's case* (e). If such were not law, there would be no remedy against the witness if foresworn. In *Arch. Cr. Pl. and Evid.*, 10th ed., p. 154, he lays down the rule thus:—"No credit whatsoever shall be given to the testimony of a witness examined *viva voce* in a Court of Common Law in this country, unless he have previously been sworn to speak the truth. Even a Peer, who in a Court of Equity is allowed to give in his answer without oath, merely pledging his honour for the truth of it, must be sworn if examined as a witness." This proceeding, therefore, being an entire nullity, cannot be supported on either express or implied consent. It must be admitted there was no express consent. Even assuming there was an implied assent, this being a nullity it cannot be waived, though an irregularity might. In

(a) 1 Salk. 278.

(b) 2 Mod. 99.

(c) 1 P. Wms. 146.

(d) 2 St. Tr. 772.

(e) Cro. Car. 64.

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Walker v. Frobisher (a), Lord Eldon refused to allow an award to stand, it being found contrary to the established principles of law, although it was assented to at the time: *Dobson v. Groves* (b); *Taylor v. Phillips* (c); *Smith v. Sparrow* (d); *Manley v. Shaw* (e); *Hunter v. Hornblower* (f); *Smith v. Sandys* (g). There is no affidavit here from the Registrar of the Court, who could have accurately detailed what took place at the trial; it would have been important to show whether or not he applied to any one person, Counsel or other, to justify him in administering the affirmation in the form he did. It is the legal right of the suitor to have the witness sworn, and we are entitled to the decision of the Court on the legal abstract question. The whole trial, owing to this proceeding, was illegal and a nullity. The form of administering an oath is part of the law—it is the act of the Court, not the act of the Counsel. In *Dr. Cooke's case* (h), the Judge interposed, and the prosecutor was sworn according to a form of oath which the Judge had prepared; but the conviction of the prisoner was set aside on the ground that Dr. Cooke, the prosecutor, had not been legally sworn. Testimony must have the sanction of a judicial oath; and though every other legal requisite may concur to render it admissible, even if the witness have been cross-examined, still that evidence is not admissible. The plaintiff was not bound to notice the conduct of the Registrar, nor was he bound to object to the evidence; and why should he be in a worse position because he did not make himself a party to an extra-judicial proceeding?

J. Perrin, in reply, was not called on.

BLACKBURN, C. J.

In this case the Court granted a conditional order for a new trial, upon the grounds stated in the affidavit of the plaintiff's attorney,

(a) 6 Ves. jun. 71.

(b) 6 Q. B. 648.

(c) 3 East, 155.

(d) 16 Law Jour. N. S. 139.

(e) Car. & Mar. 361.

(f) 3 Dow. P. C. 491; S. C. 4 D. & Ry. 831.

(g) 5 N. & M. 59.

(h) 1 Cr. & D. Cir. Cas. 187 n.

that my Lord Clarendon, who was examined as a witness for the plaintiff, was not sworn, as he ought to have been, but made a declaration binding himself to give his evidence on his honour as a Peer.

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It is as certain that he ought to have been sworn, as it is that he was not sworn, but I was impressed with the belief, as I still am, that the plaintiff assented to what had been done by the Registrar. Though we granted the conditional order with reluctance, I am glad we did grant it; because what was then taken as a matter of presumption is now ascertained by the declaration of the plaintiff himself to have been the actual fact, namely, that the plaintiff intentionally acquiesced in what took place: for on referring to his own newspaper, by the contents of which he is morally and legally bound, it distinctly appears that he did so, and boasts and takes credit for the courtesy which he thereby showed to Lord Clarendon. The words of the passage are—"With respect to Lord Clarendon, "we exhibited to him a courtesy he could not legally have claimed. "We allowed him to speak on his honour instead of having sworn "on his oath." The grounds on which he instructs his Counsel to rest this application are at direct variance with this statement, and with the whole course of the conduct of the trial. He now asks us to deprive him of the credit which he claimed for dispensing with the administration of an oath to his own witness. Could any two things be more at variance than the arguments of Counsel and this deliberate declaration? From all that occurred at the trial, and that now appears on this motion, I am well warranted in saying that the plaintiff consented to what he now complains of. And this is not a case in which there has been a tacit or constructive consent or mere acquiescence. He examined Lord Clarendon, knowing that the only obligation he was under was to give his evidence on his honour. What did every question put to the witness import? It meant an appeal to the obligation, and the only obligation by which the witness had bound himself; it was a requisition to him to give evidence under the sanction of that obligation. It is not unusual in examining to say to a witness "by the virtue of the oath you have taken." But this obviously adds

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nothing to the obligation of the witness, for from the moment he takes the oath it imposes a continuing obligation, and every question is asked and answered by virtue of it. Suppose Counsel in the present case to have said to Lord Clarendon, "by virtue of the declaration you have made," he would have done no more than what he did; he would have used other words which imported what was contained or considered in the question itself; every successive question being a distinct assent to, and an adoption of, the engagement or promise made by the witness to answer truly each and every question that might be put. It is a mistake to call this a case of acquiescence—it is more, it is a case in which the plaintiff acted, and now asks us to enable him to repudiate his own act. But he had bound himself by this act, and from it the Court have no power to relieve him.

Besides this, there is another and distinct ground for refusing the plaintiff's application. He and his Counsel knew that he had no right to examine Lord Clarendon, if he was not sworn, except by the consent of his adversary. When therefore he examined Lord Clarendon, he acted on, and had the full benefit of, a consent which the defendant had been induced by the plaintiff's own conduct to concede. Having by this course obtained the benefit of the evidence of the witness, he (to use a phrase which, though a vulgar one, is exactly suited to the case) now seeks to play fast and loose, and calls upon us by our order to effectuate a gross imposition on the defendant, by invalidating a proceeding in which he had induced the defendant to concur.

Is this a case in which the Court can be called on to interfere? Is this a case in which we should exercise the discretion vested in us for the advancement of justice? Instead of furthering justice, I think we should effectuate a fraud, enabling the plaintiff to speculate on chances, and to avoid a verdict if adverse, which he would have held if in his favour. Were authorities applicable to such a state of facts, I do not hesitate to say I would not feel myself bound by them, because they would be at variance with the plainest principles of justice, by enabling a party intentionally to annul and suppress an objection where it could have been remedied, and to

take advantage of it after a lapse of the time and opportunity of correcting it. But there is no authority for such a proposition. The case of *Sells v. Hoare* was not the case of a person who had himself examined the witness, but of a witness examined by his adversary ; and in that case the Court held the objection came too late.

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On the whole, therefore, I am clearly of opinion, and such was my opinion when the conditional order was granted, that there is no ground for disturbing the verdict. I am glad, however, the Court granted the conditional order, for it has led to the disclosure of matter which falsifies and defeats the grounds on which the motion was rested, and shows the plaintiff to have been mainly the author and cause of the very matter complained of.

Cause allowed, with costs.

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MARTHA DALTON, Executrix of ROBERT DALTON.

Jan. 12, 20.

COVENANT.—The declaration stated that one Anne Dawson (since deceased) was possessed of certain premises as tenant at will thereof A declaration in covenant averred that A, being possessed of certain premises as tenant at will to B, who was seised in fee thereof, in 1834, by deeds of lease and release, conveyed the same to C for a term of three lives, at a rent of £42, with the usual covenant for payment thereof; that B in 1835, by deeds of lease and release, conveyed the said premises to A for three different lives, and alleged that five years' rent of said premises was due by the defendant, as representative of C, to the plaintiffs as representatives of A. The defendant pleaded that A was possessed of the premises as tenant to B for so long a time as A and B pleased, which term, after the making of the indenture of release, and by reason of the death of A, wholly ceased; *absque hoc*, that A was possessed of the premises as tenant at will to B.

Secondly.—Because at the time of the making of the indenture of release, A had nothing in the premises whereof she could release to B.—*Held*, that these pleas were bad on general demurrer.

Held also, that no estate passed by the deed of 1834; but *semble*, that the plaintiffs, as assignees of the grantor of that estate, could avail themselves of the estoppel thereby created.

Held also, that the grant of 1835 operated retrospectively, and made the estate of the lessee, which was before but an estate by estoppel, an estate in interest, and gave the lessor a reversion in the premises, which, with the benefit and burden of the covenants in the lease, was transferrable to the plaintiffs.

Held, per MOORE, J., that as it appeared by the declaration the plaintiffs had no reversion, if the deed of 1835 had not been executed, an action of covenant would not be maintainable.

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to one Philip Crampton, who then and there was seised in his demesne as of fee therein ; and that Anne Dawson being so possessed, and the reversion thereof expectant on the said estate at will to Philip Crampton so belonging, she the said Anne Dawson, to wit, on the 21st day of February 1834, bargained and sold the said premises to Robert Dalton, his executors, administrators and assigns, for one whole year ; and afterwards, to wit, upon the 22nd day of February 1834, by an indenture of release, Anne Dawson released and demised to Robert Dalton, his heirs and assigns, the said premises, with the appurtenances, *Habendum* for three lives, at the yearly rent of £42, payable half-yearly on the 25th of March and 29th of September ; that Robert Dalton did thereby covenant for himself, his heirs, executors, administrators and assigns, from time to time during the term thereby granted, to pay or cause to be paid unto Anne Dawson, her heirs or assigns, the said reserved yearly rent, on the days and times and in the manner therein appointed for payment thereof.

The declaration then averred that Philip Crampton, being so seised to him and his heirs in his demesne as of fee in the said premises, on the 23rd day of June 1835, bargained and sold the same to Anne Dawson for one whole year ; and that Philip Crampton on the 24th of June released the same to Anne Dawson, her heirs and assigns, for an estate of freehold for the lives of certain persons, all of whom were still in being (one of which lives was different from the lives in the lease of 1834), and the survivors and survivor of them, *virtute cujus* Anne Dawson became and was seised for the said estate of freehold of and in the reversion in said premises expectant on the term purported to have been granted to Robert Dalton ; that Anne Dawson, being so seised of the said premises for the term granted thereof, on the 21st day of March 1841, devised the reversion thereof to the plaintiffs Michael Church and Anne Ruskell, and afterwards, to wit, &c., died so seised of the said reversion, whereupon the plaintiffs became and were seised of the said reversion ; that afterwards Robert Dalton died, and that the defendant was his executrix ; that whilst the plaintiffs were seised of the said reversion, and after the death of the said Robert Dalton,

the sum of £210 of the said yearly rent for five years became due and owing to the plaintiffs from the defendant, and still was in arrear and unpaid, contrary to the form, &c.

To this declaration the defendant pleaded amongst other pleas—

Fourthly.—*Actionem non*; because she says that before and at the time of the making the said several indentures of lease and release first above mentioned, the said Anne Dawson was possessed of the said premises as tenant thereof to the said Philip Crampton, for so long a time during the natural life of the said Anne Dawson as the said Philip Crampton and Anne Dawson should respectively please, and not for any other or greater estate or term therein, and which said term, after the making said indenture of release, upon and by reason of the decease of the said Anne Dawson, wholly ended, whereupon and whereby the said term by said indenture of release granted ceased and determined, to wit, at the place aforesaid; *absque hoc*, that the said Anne Dawson was possessed of said premises as tenant at will thereof to the said Philip Crampton in manner and form as the plaintiffs have above in that behalf alleged.—*Verification*.

Fifthly.—*Actionem non*; because she says that at the time of the making of said supposed indenture of release, the said Anne Dawson had nothing in said premises whereof she could release and demise to the said Robert Dalton, to have and to hold in manner and form, &c.—*Verification*.

General demurrer to the fourth and fifth pleas, and joinder.

The points noted were, on the demurrer to the fourth plea, that by the acquisition of a new estate by Anne Dawson, under the renewal from Philip Crampton, the release to Dalton, which previously operated by estoppel, took effect in interest.

On the demurrer to the fifth plea, that the plea amounted to *nil habuit in tenementis*, which could not be pleaded by the personal representative of a lessee, bound by an instrument under seal; that it was of no consequence that, at the date of the release to Robert Dalton, Anne Dawson had no estate in the lands, inasmuch as the subsequent renewal to her from Philip Crampton operated to feed the release to Dalton, and that the issue tendered by the fifth plea was an immaterial issue.

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J. T. Ball and Napier, for the plaintiff.

The plea of *nil habuit in tenementis* is clearly bad, there being an estoppel. If Anne Dawson was tenant at will only so long as she and Philip Crampton pleased, and then died during that tenancy, the will determined.

As to the fourth plea, the inducement is but an expansion of the estate at will; and they plead that at the time of making the lease she was not tenant at will, and conclude with an *absque hoc*, traversing that Anne Dawson was possessed of the premises as tenant at will. They do not show how they have ceased to hold under the instrument. In *Pluck v. Digges* (a), Lord Plunket says:—"It is
 "no doubt true that where an interest does pass by the deed, it is
 "competent to the party who had derived under the deed to show
 "that that interest was of a more limited nature than the instrument
 "purported; but then he must also show that the limited interest
 "has expired, and that he has ceased to hold under it; and in every
 "case in which such a defence has been set up in pleading, there is
 "an averment that the interest has ceased; and in every case where
 "the principle has been stated as a point of doctrine, it is uniformly
 "accompanied with the condition that the party setting up such a
 "defence must show that the interest which did pass is determined."
Co. Lit., p. 57, a:—"If tenant at will granteth over his estate to
 "another, and the grantee entereth, he is a disseisor, and the lessor
 "may have an action of trespass against the grantee; for albeit the
 "grant was void, yet it amounteth to a determination of his will."
Blundell v. Baugh (b). By the mere act of granting, a tenant at will determines the estate: *Moss v. Gallimore* (c): *Brook Abr.*, *Tenant per copie*, pl. 15. A tenant at will can grant no estate at all. In *Webb v. Austin* (d), the question arose on a conveyance by mortgagees to a mortgagor of all their interest, whether the mortgagor had not a good title to convey to a purchaser; and it was held that a lease, originally a lease by estoppel, was convertible into a lease in interest by the concurrence of the mortgagees. Tyndal, C. J., in

(a) 2 H. & B. 71.

(b) Sir W. Jones, 317.

(c) 1 Doug. 279.

(d) 7 M. & Gr. 724; S. C. 8 Scott, N. Rep. 419.

his judgment, citing from 2 *Preston on Abstracts*, p. 210, says :—
 “ An indenture of lease, or a fine *sur concessit* for years, will be an
 “ estoppel only during the term. It first operates by way of estoppel,
 “ and finally, when the grantor obtains an ownership, it attaches
 “ on the seisin and creates an interest, or produces the relation of
 “ landlord and tenant; and there is a term *commencing* by estoppel,
 “ but for all purposes it becomes an estate or interest. It binds the
 “ estate of the lessor, &c., and therefore continues in force against the
 “ lessor, his heirs, &c. It also binds the assigns of the lessor and of
 “ the lessee.” He refers to and cites from *Bac. Abr., Leases*, O :
Sturgeon v. Wingfield (a). *Coke Lit.*, 47 b, note 11 : “ *Et videtur*,
 “ that by purchase of the land, that is turned into a lease in interest
 “ which before was purely an estoppel.”

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Meagher and J. D. Fitzgerald, contra.

We admit the pleas are bad, and therefore must argue the case as if on a demurrer to the declaration. The plaintiffs cannot say there is an estoppel, for on their declaration they set out a tenancy at will, which they allege determined by the making of the lease; and they thus show that no estate passed. But it is argued that the subsequently acquired interest fed the estoppel; but what is the effect of that new interest? To feed the estate which previously operated as an estoppel, and that thus Robert Dalton acquired a good estate by that renewal. But if no estate passed, no reversion existed at the time of the covenant being entered into, and then no new estate would pass to the heir of the party; by the subsequent release to Anne Dawson no estate passed to her : *Doe v. Sherlock* (b). If the declaration had not disclosed that the indenture was under seal, the defendant could have pleaded *nil habuit in tenementis*; and if to that plea the plaintiffs had not replied the execution of a lease under seal, concluding by way of estoppel, the jury would have found for the defendants. The plaintiffs have waived the estoppel by their declaration, setting out the facts : *Ludford v. Barber* (c). There Buller, J., says :—“ The Court cannot go on

(a) 15 M. & W. 224.

(b) 2 Fox & Sm. 79.

(c) 1 T. R. 90.

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"the doctrine of estoppel in this case, because it is admitted by the plaintiff's own showing, on these pleadings, that the plaintiff did not execute (the deed) until two years after the death of the tenant for life." *Pargeter v. Harris* (a) shows what statements in a declaration in covenant are material, and that the recital of a lease set out was sufficient to prevent either party from being estopped denying that the plaintiffs had a legal reversion; that in truth they were estopped from asserting it. 2 *Smith L. Cas.*, pp. 436, 437, citing *Lord Coke* :—"An estoppel is where a man is concluded by his own act or acceptance to say the truth." Where the truth appears by the same record there is no estoppel.

Ball replied.

Cur. ad. vult.

Jan. 20. CRAMPTON, J., delivered judgment. After stating the pleadings, his Lordship proceeded to say:—

These pleas are clearly bad, and were accordingly on the argument abandoned by the defendant's Counsel, who rested his case upon the insufficiency of the declaration; the case is therefore to be considered as if the defendant had demurred generally to the declaration.

It was contended on the defendant's part, that the plaintiffs on their own showing could not maintain this action; that the lessor having *no estate in the land* at the time of the lease granted, no interest thereby passed to the lessee; that no legal reversion existed, and therefore the covenants in that lease were but covenants in gross, not running with the land; and although, as between the lessor and lessee, the latter was estopped from denying that the estate passed to him, and that the lessor had a reversion in him, yet that the assignee was not entitled to the benefit of the estoppel; and that the grant of 1835 could not operate to vest in the lessor retrospectively a reversion, which did not exist at the date of the lease, to convert the covenants which were originally covenants in gross into covenants appendant.

(a) 7 Q. B. 702.

the plaintiffs' part it was argued that the lessee was estopped by the term granted by the lease of 1834 from denying the effect of the estate so granted, or that a reversion expectant upon the estate existed in the lessor at the time of the granting the lease; and that the assignee of the lessor was entitled to the benefit of the estoppel, and to the right to sue upon the covenants in the lease; or at all events, that the operation of the grant of 1835 was retrospective, and placed the parties in the same position and relation as if that grant was prior to the lease in date.

It is perfectly clear that by the lease of 1834 no estate or interest passed to the lessee. That conveyance (it is admitted on all sides) put an end to the tenancy at will, the only estate which Anne Dawson had when she made the lease to Dalton. The lease of 1834 was therefore good by estoppel only; and had the grant of 1835 not been made by the head landlord to Anne Dawson, the question would have been, whether the plaintiffs, as assignees of Anne Dawson, could avail themselves of the estoppel, and sue the defendant for a breach of the covenants contained in the lease of 1834? Upon that question the authorities are conflicting. *Noke v. Awdler* (a), and *Whitten v. Peacock* (b), may be cited on the one side, and *Palmer v. Ekins* (c), and *Parker v. Manning* (d), may be cited on the other; the cases are referred to and commented on by Mr. Smith, in his very able note upon *Spencer's case* (e), and the opinion of Parke, B., in the case of *Gouldsworth v. Knights* (f), is manifestly that the estoppel extends to the assignee.

However it is unnecessary for us to decide that question; for we are of opinion that the operation of the grant of 1835 was to make the estate of the lessee, which was before only an estate by estoppel, an estate in interest, and to give to the lessor a reversion in the premises, which, with the benefit and burden of the covenants in the lease, was transferrable to the plaintiffs by the will of the lessor.

In order to produce this effect, we must undoubtedly, as between these parties, give a retrospective operation to the grant of 1835.

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(a) Cro. Eliz. 436.

(b) 2 Bing. N. C. 411.

(c) 2 Ld. Ray, 1550.

(d) 7 T. R. 537.

(e) 1 Sm. L. C. 22.

(f) 11 M. & W. 337.

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But for this construction, there is, I think, ample authority, and justice and reason are manifestly on the same side. In *Coke Litt.*, p. 47, *b*, it is thus laid down:—"If A had nothing in the land, and "made a lease for years by deed indented, and after purchase the "land, the lessor is as well concluded as the lessee to say that the "lessor had nothing in the land." And *Lord Hale*, in his note on this passage says:—"Et videtur, that by purchase of the land, "that is turned into a lease in interest which before was purely an "estoppel." This opinion of *Hale's* is contrary to a *dictum* in a case of *Iseham v. Morrice* (*a*); but it appears to be supported by later authorities, especially by the opinion of the Court of Exchequer in *Gouldsworth v. Knights* (*b*), and the case of *Webb v. Austin* (*c*). In that last case the very point arises; and I shall, instead of stating the case in the detail, refer to the observations of Mr. *Smith* upon the subject in the note to *Spencer's case*.

The form of the pleading does undoubtedly give colour to an objection made by the defendants' Counsel, namely that the plaintiff, on the face of his declaration, shows that there was, and could be, no reversion in the lessor at the time of the lease being granted, and the truth appearing on the plaintiff's own showing that no estoppel could be relied upon by him. This objection might have more weight if the plaintiffs had only the estoppel to rely on; but if we are right in giving a retrospective operation to the deed of 1835, the objection is removed; the estate of the lessee has thereby become an estate in interest, the lessor has acquired a reversion, and the relation of landlord and tenant, with all its consequences, is conclusively established between the parties. That reversion is now vested in the plaintiffs, and an estate for three lives under the lease of 1834 is now vested in the defendants. If this be so, the averment in the declaration, that the lessor, at the making of the lease was a tenant at will to Philip Crampton, became an impertinent allegation which could be taken advantage of only by a special demurrer, whereas the case is now before us as upon a general demurrer to the declaration. Had the plaintiffs in their

(*a*) Cro. Car. 109.

(*b*) 11 M. & W. 337.

(*c*) 8 Scott, N. R. 419.

declaration (complying with the rule of pleading which requires an assignee to show a reversion in his assignor) stated a seisin in fee, a seisin under the grant of 1835, the declaration would not have been open to this objection.

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It follows therefore, that we must allow the demurrer, and on these pleas give judgment for the plaintiffs.

PERRIN, J.

I concur with my Brother CRAMPTON in his judgment, although I confess I feel difficulty as to the form of this declaration; it appears to me quite an unusual one.

MOORE, J.

In this case it appears, on plaintiffs' declaration, that when Anne Dawson executed the indenture of demise to Dalton, she had no estate or interest in the lands; for though, in his declaration, he states that before the making of that indenture Anne Dawson was tenant at will, yet it appears from the authorities that the very deed determined the will; therefore no estate or interest passed by the lease to Dalton, it operated therefore only by estoppel. If after the lease no new estate had been acquired by the lessor, and that the lessor had then executed the assignment to the plaintiffs, I think the plaintiffs could not have maintained covenant against the lessee or his executor on a declaration framed as this—for it would then appear on the declaration that when the lessor made the assignment to the plaintiff she had no reversion. And I think it clear that a covenant was not assignable unless when attached to the reversion, and then only by operation of the statute: *Thursby v. Plant* (a). But it is contended by the plaintiff that when he subsequently acquired the estate, the lease no longer operated by way of estoppel, but was served out of the subsequently acquired estate. That is true; but the question is, "Had that newly-acquired estate a retrospective operation so as to create a reversion to which the covenant was to be attached?" I think that such was the legal effect of the newly-acquired estate. In *Webb v. Austin* (b), Tyndal, C. J.,

(a) 1 Saund. 236.

(b) 7 M. & Gr. 724.

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says (citing *Preston on Abstracts*):—"The general understanding
 "appears to be that an indenture of lease, or a fine *sur concessit*
 "for years, will be an estoppel only during the term. It first ope-
 "rates by way of estoppel, and finally, when the grantor obtains an
 "ownership, it attaches on the seisin and creates an interest, or
 "produces the relation of landlord and tenant, and there is a term
 "commencing by estoppel; but *for all purposes* it becomes an estate
 "or interest. It binds the estate of the lessor, &c., and therefore
 "continues in force against the lessee, his heirs, &c. It also binds
 "the assigns of the lessor and of the lessee." In support of those
 views, reference is made to *Bacon's Abr., Leases, O*, which article
 has been always considered as a work of great authority. It is there
 said: "If one makes a lease for years, by indenture, of lands, wherein
 "he hath nothing at the time of such lease made, and after purchases
 "those very lands, this shall make good and unavoidable his lease,
 "as well as if he had been in the actual possession and seisin thereof
 "at the time of such lease made." In adopting this view, no prejudice
 is done to the lessee, nor are the rights of the lessor or his assignee
 increased. If no new estate had been subsequently acquired by the
 lessee, and that the lease only operated by estoppel, I think the
 plaintiff as assignee of the lessor could by a proper pleading have
 recovered in covenant. In the case of *Palmer v. Ekins (a)*, the
 plaintiff sued in covenant as assignee of the lessor, and stated in his
 declaration that before the lease the lessor was seised in fee, then
 made the lease, and then assigned the reversion to the plaintiff.
 The defendant pleaded that, before the lease was made, the lessor
 had conveyed the lands in fee to another person, and then traversed
 the seisin in fee of the lessor at the time of the lease; to this the
 plaintiff demurred generally. It is plain that on the facts stated in
 the plea in that case, and admitted by the demurrer to be true, the
 lessor had nothing in the lands when he made the lease, and there-
 fore that the lease only operated by estoppel, and that plaintiff was
 not assignee of any reversion, but only assignee of an estoppel. The
 Court decided that the plea was bad, for that it was a special *nil*
habuit, and that the lessee was estopped from pleading such a plea,

(a) 2 Stra. 817.

and that the plaintiff, though an assignee, might take advantage of the estoppel, and the Court gave judgment for the plaintiff. In *Parker v. Manning* (a); the action was covenant for rent by the plaintiff, as assignee of the lessor, who was a bankrupt. The defendant pleaded the seisin in fee of another person at the time the lease was made, and that the lessor *nil habuit* when he made the lease. On a general demurrer the Court gave judgment for the plaintiff. In this case it is observable that the plaintiff did not aver or show in his declaration that the lessor had any reversion. In the case of *Gouldsworth v. Knights* (b), which was an action of trespass, the defendant justified the taking as a distress for rent; the evidence showed only a tenancy by estoppel in the assignor of the defendant. The Court decided that the distress was legal.

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I think the above cases establish that the assignee of a lease, good only by estoppel, may sue in covenant, and before payment of the rent. I think the case of *Webb v. Austin* establishes the same proposition. That was an action of assumpsit to recover back a deposit, on the ground of bad title. The interest contracted to be sold was the lessor's interest in the premises demised by him for a certain term of years. It appeared that when the lease was made, the lessor was only a mortgagor, and therefore had no legal title; and it was contended that the purchaser had not full remedy to enforce the rent reserved on the lease. It appeared in the case that the mortgagee was willing to join in the conveyance; and the Court held that the title was good. I think the point decided in this case was, that when the assignee of a lease by estoppel had also acquired the legal title, the lease was then served out of the interest, and that the assignee was entitled to the benefit of the covenants in the lease, and could sue on them as assignee of the reversion.

If then I be right in thinking that the assignee of the lessor's interest on a lease by estoppel could maintain covenant, it would be contrary to common sense and justice that the assignee should be in a worse position because the lease was made good against all the world by the acquisition of the legal title by the lessor.

A lease operating only by estoppel is good against the parties and

(a) 7 T. R. 537.

(b) 11 M. & W. 337.

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those privy to them, but is invalid against those having the legal title ; and when the good title is acquired by the lessor, the lessee is benefited by having his lease made good against every one ; and it is therefore just that, taking the benefit, he should have the burden, and be liable to all the obligations imposed on him by his lease.

I am therefore of opinion that, the true state of facts appearing on the record, and it appearing that Anne Dawson the lessor had after the lease acquired a legal estate, which would, subject to the lease, leave her a reversion, this new estate had a retrospective operation, and that she and her tenant were then placed with regard to each other as if she had the same estate when she made the lease ; and that having subsequently assigned her reversion to the plaintiff, he is fully entitled to sue in covenant for the rent reserved by the lease.

Judgment for the plaintiff.

SHERLOCK v. GIBBINGS and another.

Jan. 22.

A special plea was filed to a declaration, and a copy of the plea furnished, which was demurred to, and notice of the lodgment of the demurrer

books served on the defendant's attorney ; after such ser-

THE action in this case was brought to recover one-half year's rent out of certain premises, and the declaration contained one count in debt, on a demise for sixty years, at a rent of £50, stating that £25 for one half year's rent was due by the defendants. It also contained a count for use and occupation, and a count on an account stated.

The defendants pleaded a special plea, commencing in this form :—*Actionem non* ; “ Because the said defendants say that vice the plaintiff's attorney was served with a notice, stating the demurrer books did not correspond with the record, and pointed out several variances ; thereupon plaintiff's attorney offered to withdraw the demurrer on payment of costs, and being at liberty to reply *de novo*, which offer was not accepted.—*Held*, that as the copy of the pleas served was not a true copy, the plaintiff was entitled to the terms proposed by his notice, and also to the costs of a motion rendered necessary by the declinature of his offer.

“as to the said first count in said declaration mentioned, the said
 “plaintiff ought not to have or maintain his aforesaid action against
 “them,” &c., and concluded thus :—“Wherefore they pray judgment
 if they ought to be charged with the said sum of £25.”

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The second plea began thus :—“And for a plea in this behalf to
 “the second and third counts in said declaration, the said defendants
 “come,” &c., pleading *nil debet* in the usual form.

A copy of these pleas was served on plaintiff's attorney on the
 22nd of December 1851, and a special demurrer was taken, assigning
 as cause that the first plea was pleaded to the entire declaration, and
 in the body of it it was confined to the first count only ; and another
 cause of demurrer assigned was, that the words “jointures” and
 “annuities” were used in the first plea, where they should have
 been “jointure” and “annuity ;” but on this nothing turned.

A joinder in demurrer was filed, and on the 13th of January
 1852, the defendant's attorney was served with a notice of the
 lodgment of the demurrer books, and on the 14th the plaintiff's
 attorney was served with a notice, stating that the books did not
 correspond with the record, and pointing out as variance the
 causes above mentioned. When the file was examined it stood
 thus :—“Because they say that by the said indenture of lease in
 said declaration mentioned ;” and the words “first count of said”
 were interlined between the words “said” and “declaration ;”
 and the word “in” was changed into “as to,” making the plea
 run thus : “Because they say that by the said indenture of lease
 as to said first count of said declaration mentioned.” The copy
 of the plea served corresponded with the original engrossment ;
 but the words “in the first count” were afterwards interlined be-
 tween the words “lease” and “in,” and the words “jointures or
 annuities” were altered into “jointure or annuity.” On the 15th
 of January, when plaintiff's attorney discovered the variance, he
 served notice on the defendant's attorney, offering to withdraw the
 demurrer on the payment of the costs of making up the demurrer
 books, and being at liberty to reply *de novo*, which offer was not
 complied with. Thereupon a notice of motion was served, on
 behalf of the plaintiff, that the defendants might be compelled to

H. T. 1852. amend the copy of the pleas served, and make it conformable to the
Queen's Bench pleas on the file of the Court, and to pay the costs of the demurrer
 SHERLOCK taken by the plaintiff to the said copy, and of the making up the
 v. demurrer books, and to enter the rule to reply *de novo*.
 GIBBINGS.

Martley and Sherlock, for the motion.

This is an action of debt on a demise, and the first plea purporting to answer the whole declaration only applies to the first count; the second plea is pleaded, without the leave of the Court, to a portion of the declaration. The variances are numerous, and several informalities are specified in the affidavit to ground the motion. The attorney of the plaintiff swears he believed the copy served a correct copy, and was not aware of the variances until the 15th of February, when he received a letter from the defendants' attorney apprising him of them. On the 13th of January the defendants' attorney had been served with the usual notice of the demurrer books being lodged, which clearly renders them liable for the costs of the demurrer and the costs of the motion: *O'Connell v. Unthank* (a); *Palmer v. Robinson* (b). These were cases where the Court held, owing to the misprision of the party, that the other side should be paid the costs incurred by such misprision. 13 Vic. c. 18, s. 44, enacts, that on the filing of any pleading, &c., "the party filing the same shall cause to be served and delivered, together with the notice thereof, a true copy of such pleading," &c., "and it shall not be necessary for either party to take out or produce in Court, or before any Judge or Baron in Chamber, an attested copy of any pleading, &c., a copy of which shall have been delivered, unless it shall happen that the trial, hearing, or motion upon which the copy of such pleading, &c., shall be read or used, shall be had or made at Assizes, or at any place where immediate reference cannot be had to the original pleading, &c., in the event of the accuracy of the delivered copy being disputed," &c. The attorney of the opposite party is thus not warranted in going to the file of the Court, unless it be in reference to a record

(a) 1 Com. Law Rep. 352.

(b) Ibid. 354.

going down for trial at Assizes. Here the document served was not a true copy of the pleas, and the demurrer which, as taken, was good, now by the amendments has become doubtful.

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J. D. Fitzgerald and Blackham, contra.

Though the first plea be ambiguous in its commencement, yet it is in reality pleaded and confined to the first count.—[CRAMPTON, J. But is it not demurrable as professing to answer the whole declaration, and covering only a part?—If it were ambiguous it would, but as pleaded it cannot mislead.—[MOORE, J. On a motion of this sort it is very inconvenient for the Court to be led into a question as to whether a demurrer be good or bad.]—The demurrer was but a pretence, and the test will be to let the engrossment be altered and made conformable with the copy, and argue the demurrer.—[CRAMPTON, J. It would be enough if the plaintiff succeeded on but one of these points—it is the constant practice to assign a great many causes of demurrer, though the demurring party may have but one solid ground.—PERRIN, J. Is there ever on the taxation of costs any allowance made for the number of causes of demurrer?—MOORE, J. You admit you may act on the copy furnished, to a certain extent, and why is your opponent to be obliged to look to the record for a further extent?—CRAMPTON, J. The officer has nothing to do in the way of comparison.]—We must admit they are entitled to the costs up to the making of the demurrer books; but if the demurrer were argued, the Court must give judgment on the actual record.—[PERRIN, J. If we discovered before the argument on demurrer that the books were wrong and the record right, the Court would not give judgment on points that did not arise on the record, but would certainly oblige the party through whose default the variance arose to pay the costs.]—This record is before the Court, and we are not in the position of being at Assizes; we have a right record and a wrong demurrer; and the Common Pleas have, in the cases cited, held that the party was bound to inspect the record.

Sherlock was not called on.

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CRAMPTON, J.

This was a motion on the part of the plaintiff to compel the defendants to amend the copy of the pleas furnished by them, on the ground of variance between the copy and the pleas on the file, and by his notice of motion he asks for the costs of the amendment and of a demurrer taken, grounded on the copy so served, and for the costs of this motion. One thing is perfectly plain, without imputing aught but mistake to any one, an erroneous copy of the pleas was furnished by the defendants' attorney. The Practice and Process Act (not merely a rule of Court) requires that a *true* copy of every pleading be served and delivered. Has such true copy been furnished here? Certainly not. I do not mean to say that every letter and syllable in the original is to be in the copy; but to constitute a true copy, it ought to follow very nearly the tenor of the original. There may be a difference in a letter, or in the spelling of a word, but if the copy be not a true one, then the Act of Parliament is not complied with. Admittedly this is not a true copy; but it is said the variances are immaterial, and that the same demurrer would have been taken if the copy agreed with the original. But the demurrer is taken to the copy, not to the original; and the variances are not immaterial, because on the copy, as furnished, *prima facie* there is a cause of special demurrer. Then it is suggested we might amend the plea according to the copy, and we are called on to give our opinion on the demurrer taken; but that we cannot do, we must deal with the case as it stands on the copy furnished; and as regards the copy, there is at least one ground of demurrer good.

The first plea is plainly pleaded to the first count of the declaration; the copy is not so, for it merely refers to "the indenture in the first count" of the declaration. The plaintiff may have been led to take this demurrer, believing the copy furnished was a true copy of the pleadings; and his duty then was to make up the demurrer books; but it was not his duty to compare the copy of the pleadings with those on the file of the Court. It might have been prudent in him doing so, but he did not, and so he made up the books from the copy. The error then has arisen by the act of the defendants' attorney, and from that the consequences here have

ensued ; and we are of opinion that, regarding the stringent terms of the Act of Parliament, the party who committed the error is bound to repair it ; and that can only be done by placing the plaintiff in the same position as when the erroneous copy was furnished. He is entitled to have the copy amended, and to the costs of the demurrer ; and the only difficulty we entertain is, as to the costs of this motion. We have been referred to two cases decided in the Court of Common Pleas ; in *O'Connell v. Unthank* no costs of the motion were given, because the Court were under the impression that it was the duty of the party making up the books to compare them with the pleadings on the file. However, we think the costs must be given in this case to the plaintiff, and the motion granted in the terms of his notice, and that by so doing, we but follow out the intention of the Act of Parliament.

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PERRIN, J.

I concur ; I think it would impose a hardship on a party to oblige him to compare the demurrer-books with the record after the demurrer had been taken.

MOORE, J.

Where the Legislature has imposed a duty on the attorney, of furnishing a true copy, and he omits to do so, the costs of the error must be visited on the party through whose default it arises.

Motion granted.

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BOYCE v. RUSBORO'.

Jan. 26.

The practice
 in applying
 for a commis-
 sion to ex-
 amine wit-
 nesses resident
 abroad.

IN this case, which was an issue directed by the Court of Chancery to try the validity of a will—

Whiteside, on behalf of the defendant in the cause, and plaintiff in the issue, moved that a commission do issue to examine certain persons, resident in America, as witnesses in this cause.

Brewster, contra.

The applicant for this order ought to be compelled to furnish to the opposite party the residence of the witnesses sought to be examined: *Malley v. O'Malley* (a). The affidavit made in support of this motion merely states that the parties are resident in America.

Per Curiam.

Let a commission issue, directed to J. Rolland, Chief Justice, S. Gale, C. Day, and James Smith, or other Judges for the time being of her Majesty's Superior Courts at Montreal, or any one of them, returnable on the 1st day of June next, commanding them, or either or any of them, to hold a commission for the examination on oath *viva voce* of (naming the witnesses), to be examined on behalf of the defendant in this cause; defendants hereby undertaking to furnish the plaintiff, two months previous to such examination, with the names, additions and residences of the witnesses so to be examined. Let the plaintiffs be at liberty to cross-examine such witnesses, and let the Commissioner or Commissioners reduce to writing the evidence of such witnesses, and return said commission, together with the depositions, to this Court.

(a) 6 Ir. Law Rep. 154.

H. T. 1852.
Queen's Bench

NICHOLAS B. GREENE v. P. O'KEARNEY and others.*

Jan. 31.

THIS was a case sent by the Lord Chancellor for the opinion of this Court.

The case stated that by an indenture bearing date the 19th of June 1830, made between Robert Usher and Helen his wife of the one part, and Joseph William Belcher of the other part; after reciting that Robert Usher and Helen his wife were then seised in fee and possessed of several towns and lands in the county of Tipperary, subject to a lease thereof for a term of three lives and thirty-one years in reversion, at the yearly rent of £277. 5s. 0d., and of other lands in the county of Cork, in right of the said Helen, then in possession of the said Robert and Helen, and their undertenants; *it was witnessed* that, for the conveying and assuring of all and singular the said lands, tenements and hereditaments to the uses, intents and purposes thereby expressed, limited and declared, in order to make provision for said Robert in case he should happen to survive his said wife, and to enable the said Robert and Helen, during coverture, to charge the said premises, and make the same effectually liable to the payment of the sum of money therein mentioned, and

Baron and feme, by indenture dated the 19th of June 1830, conveyed fee-simple estates vested in the wife to the use of the husband for life, remainder to the wife for life, remainder to their children in such shares and proportions as the husband and wife should appoint, and in default of appointment, share and share alike. The deed reserved a power to the husband and wife to appoint the said lands for any term of years to any

person for any sum of money not exceeding £2000, or to charge and incumber the same, and the estates thereby limited, with the payment of any sum not exceeding £2000, for the use and benefit of the husband; and it was thereby also agreed that it might be lawful for the husband and wife, by any deed under their hands and seals, to make any lease or leases of all or any part of the lands for any term or number of years, or for any term of one, two or three lives, with or without covenant for perpetual renewal.

After the execution of this deed the husband and wife, by indenture of the 23rd of June 1838, in consideration of £1100, granted a portion of these lands to the plaintiff, describing him as the mortgagor of the lands, for a term of three lives and thirty-one years in reversion after the expiration of twenty-eight years unexpired, and for such other lives as should be added in pursuance of a covenant for perpetual renewal, at the yearly rent of £277, payable at the determination of the twenty-eight years. This lease contained the usual power of distress and re-entry, a covenant for payment of the rent, and a covenant for perpetual renewal on payment of one shilling as a renewal fine.

Held, that as against the plaintiffs claiming under this lease of 1838, the limitations in favour of the children in the deed of 1830 were not fraudulent and void within the meaning of 10 Car. 1, sess. 2, c. 3.

Held also, that the lease of 1838 was a valid execution of the power of leasing contained in the deed of 1830.

* *Absente* BLACKBURNE, C. J.

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to limit the said premises so charged after the death of the said Robert and Helen to the issue of said Robert and Helen in manner as therein was directed, it was agreed and concluded by and between the parties thereto, and the said Robert Usher, for himself, his heirs, executors and administrators, did covenant with Joseph William Belcher to levy a fine or fines of the lands of, &c. (naming them), and it was declared that same should enure to the uses, intents and agreements therein expressed, and that the said Joseph William Belcher and his heirs should stand seised and possessed of the several premises to the uses and intents so expressed and declared, and to no other use and intent whatsoever, that is to say (subject and subsequent to the powers therein and thereafter mentioned and reserved to the said Robert Usher and Helen his wife), to the use of the said Robert Usher for life, and from and after his decease to the use of the said Helen Usher for life, and from and after the decease of the said Robert and Helen, to the use of all and every the child or children living at the time of the execution of the said indenture, and thereafter to be born of them the said Robert and Helen, males and females, or of such one or more children, for such estate and estates, and to vest at such time, or to take such sums charged on said lands and premises, and in such shares and proportions, and in such manner and form in respect to such estates in said lands, or to charges to be made thereon, as the said Robert Usher and Helen should thereafter by any deed or deeds by them jointly executed from time to time, as occasion might require, limit and appoint; and in default of such appointment, to the use of the child or children of Robert and Helen who should be living at the time of the death of the survivor of them the said Robert and Helen, equally, share and share alike as tenants in common in tail general, with cross remainders; and in default of such children and their heirs, to the use of Robert Usher, his heirs and assigns.

And it was thereby declared and agreed that it should and might be lawful to and for the said Robert Usher and Helen his wife, from time to time during their joint lives, by any deed or deeds in writing under both their hands and seals, to be by both of them executed, to limit and appoint the said several towns, lands and premises, or any

part thereof, to any person or persons whatsoever for any term or number of years, by way of mortgage or otherwise, as a security or securities for any sum or sums of money not exceeding £2000, principal money, together with lawful interest for the same, or to charge, incumber or make liable the said lands and premises, or any part thereof, and the estates thereinbefore limited to the respective uses of the said Robert and Helen his wife, and of the children of the said Robert and Helen, with the payment of any sum or sums not exceeding £2000, with lawful interest for the same, and for the use and benefit of the said Robert Usher.

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And it was thereby declared and agreed that it should and might be lawful to and for the said Robert Usher and Helen his wife, from time to time, by any deed or deeds indented, under both their hands and seals, to be by both of them executed, to make any lease or leases of all or any part of the same lands for any term or number of years, or for any term of one, two or three lives, with or without covenant for perpetual renewal.

This indenture was duly executed, and enrolled in the Common Pleas in Trinity Term 1830. Two fines were levied of the lands in pursuance of the covenant, in the same Court and Term.

The case further stated that by indenture of the 23rd of June 1838, between Robert Usher and Helen his wife of the one part, John Greene, therein described as a mortgagee of the lands, of the second part, and Nicholas B. Greene, the plaintiff, of the third part; *it was witnessed* that Robert Usher and Helen his wife, in consideration of £1100, and of the covenants and agreements therein mentioned, granted a portion of these lands to N. B. Greene and his heirs, in as ample and beneficial a manner as the same were granted by a deed of the 4th of March 1768, for a term of three lives and thirty-one years in reversion—of which term a period of twenty-eight years was unexpired, and the beneficial interest in which was then vested in N. B. Greene, *Habendum* unto N. B. Greene, his heirs and assigns, for three lives therein mentioned, and for such other lives as should be added, in pursuance of a covenant for perpetual renewal, at the yearly rent of £277. 5s. 0d., payable half-yearly on 1st of May and 1st of November—the first payment to be

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~~Helon~~ Usher died on the 1st of February 1845, and Robert Usher on the 19th of October 1847, leaving five daughters then surviving (under whom the defendants claimed).

One of the lives named in the lease having dropped, a bill was filed in 1848 by N. B. Greene for a renewal; and the cause having come on for hearing, the Lord Chancellor sent the following questions for the opinion of the Court:—

First.—Whether, as against the plaintiff, claiming under the lease of the 23rd of June 1838, executed by Robert Usher and wife to the plaintiff, the limitations in favour of children in the said indenture of settlement in the pleadings mentioned, bearing date the 19th of June 1830, were fraudulent and void within the meaning of the Act 10 *Car.* 1, sess. 2, c. 3?

Secondly.—Whether the said lease of the 23rd of June 1838 was a valid execution of the power of leasing contained in the said settlement of the 19th of June 1830?

Sadleir (with him *R. W. Greene*), for the plaintiff.

As to the first question, that depends on the construction to be put on the words of the statute 10 *Car.* 1, sess. 2, c. 3, especially the words used in the first section, “for money or other good consideration paid or given.” By the first resolution in *Twyne's case* (a), it is said that *paid* is to be referred to money, and *given* is to be referred to good consideration; so the sense is for money paid, or other good consideration given, which words would exclude all consideration of nature or blood, or the like, and are to be intended only for valuable consideration. Here the clear object of the parties was to obtain a power of appointment amongst their children, so as to exercise a control over them; this was merely a consideration of

(a) 3 Rep. 80; S. C. 1 Smith, L. C. 8.

nature or blood. It may be said on the other side that the concurrence of two parties in a conveyance forms a consideration for such conveyance; and the cases of *Scot v. Bell* (a), *Doe d. Hamerton v. Mitton* (b), *Musherry v. Chinnery* (c), *Parker v. Carter* (d), may be relied on in support of this proposition; but in all these cases there was a valuable consideration given by the person taking the estate, in addition to a concurrence in the transaction. In *Scot v. Bell*, a woman gave up her jointure; in *Doe v. Mitton*, the mother of the settlor discharged a part of the lands from her jointure; and in *Musherry v. Chinnery* (e), Sir E. Sugden says it appeared that Lord Musherry had estates of his own which he settled on his wife. In *Parker v. Carter*, it appears that two parcels of land were brought into the settlement of 1790, which were not comprised in the former settlement; and the *dictum* of Vice-Chancellor Bruce in that case is ambiguous, as it is not clear whether he was inclined to support the deed of 1790, on the ground that it was founded on good consideration, or on the principle that the heir could not defeat a voluntary conveyance of his ancestor, and he dismissed the bill. Here the husband gave nothing out of his life estate; his concurrence in the act was not a consideration paid or given, within the meaning of the statute. *Goodright d. Humphreys v. Moses* (f), recognised in *Currie v. Nind* (g), is an express authority on this point.

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With respect to the second question; the words of the power are general—there is no limit as to term or rent. In *The Attorney-General v. Wray* (h), Lord Eldon says:—"Notwithstanding I am of opinion that the Act gives a power beyond what was intended, yet I do not think that a Court of Equity has a right to cut down leases that are within the express terms of it." It may be said that this lease is invalid by reason of the fine having been taken, as there is no express authority to take fines; but the case of *Nugent d. Galway v. Cuthbert* (i) shows that a fine may be taken although

(a) 2 Lev. 70.

(b) 2 Wilson, 356.

(c) Ll. & G. temp. Sug. 216.

(d) 4 Hare, 400.

(e) 3 Law Rec. N. S. 297.

(f) 2 W. Blac. 1019.

(g) 1 M. & Cr. 17.

(h) Jac. 310.

(i) 1 Fur. L. & T. 50.

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not warranted by express words in the power. As there is no limit to the term in this case, it is clear that the best rent was not in the contemplation of the parties; and it would not be reasonable that a benefit should be conferred on a stranger by a lease under the best rent without getting a consideration by way of fine. It may be said that some rent must be reserved, that the rent is not fair, and that no rent is reserved until the end of twenty-eight years; but the lease reserves the old rent, the only one that could be in the contemplation of the parties except a rent-seck. The rent is payable immediately. The lease demises the lands in as ample a manner as the same were demised by the lease of March 1768, for a term of three lives and thirty-one years, of which latter term a period of twenty-eight years was then still unexpired, the beneficial interest in which was then vested in N. B. Greene, and in as ample a manner as they were then held and enjoyed by the lessee, and it reserves the yearly rent of £277. 5s. 0d. payable on the 1st of May and the 1st of November—the first payment to be made on such of said days as should first happen after the determination of the said term of twenty-eight years. “Term” there means the estate in the lands, and not a certain number of years (1 *W. Saund.* 112, A 1), and this amounts to an implied surrender of that term (*Com. Dig., Surrender*, I); *Lyon v. Reed* (a); so that the term being at an end the rent is payable forthwith. In the present case the words are general without any limitation, and therefore free from all ambiguity.

T. R. Henn, and *R. J. Lane*, for the defendants.

We contend that the indenture of settlement of 19th June 1830 is not fraudulent and void as against the plaintiff claiming under the lease of 1838; but that it is a deed for good and valuable consideration, and that at all events it is good and valuable as against the covenant contained in that lease for perpetual renewal. And secondly, we say that the lease is not a valid execution of the power contained in the settlement.

It must be admitted that a post-nuptial settlement, however meri-

(a) 13 M. & W. 306.

torious the object of the parties, as against subsequent *bona fide* purchasers is fraudulent; that is, fraudulent within the policy of the statute, as against the actual consideration of price; but that proposition must be understood with this reservation, that the property settled is at the time of the settlement within the free, sole and uncontrolled dominion of the party who afterwards aliens it for value. Notwithstanding that the Courts of Law have said, that a settlement after marriage, so executed by such an owner, shall not stand in the way of a subsequent purchase for a pecuniary consideration, yet they have been astute to discover circumstances attending it, which will stamp it with value, and which will repel the presumption of this statutory fraud. Accordingly, a mere verbal promise before marriage is a sufficient consideration to support a post-nuptial settlement. So a portion given to the husband by the friends of the wife is a valuable consideration for the limitations of a settlement after marriage, in favour of the wife and the issue. Again, if a wife, who has a present provision by an ante-nuptial settlement, surrenders such interest after the marriage and takes a fresh and even ampler provision for herself and her issue, the second settlement will prevail in its entirety against a subsequent purchaser for valuable consideration; and this, although its limitations may embrace objects unprovided for by the first. And lastly, when the post-nuptial settlement is effectuated by parties whose mutual *concurrence* is essential to its execution, if it can be collected that such concurrence is the object of contract, and more especially if the concurrence of one party is *purchased* by the other, such settlement is unimpeachable in Courts of Law and Equity. To use the language of Mr. *Roberts*, in his work on *Voluntary Conveyance*, p. 66:—"The presumption of fraud may be repelled by showing that the transaction or treaty on which the conveyance was founded virtually contained some conventional stipulations, some *compromise* of interests or reciprocity of *benefits*, that point out an object and motive beyond the indulgence of affection or claims of kindred, and not reconcileable with the supposition of intent to deceive a purchaser. But where no reciprocity of benefit, no substantial interchange, compromise or

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 "perfect blank, and when no inducement appears but the suspicious
 "attraction of proximity of relationship, such a conveyance, coupled
 "with a subsequent negotiation for sale, is conclusive evidence of
 "the statutory fraud, and imperative upon Courts and juries."
 This case, upon this branch of it, falls clearly within the last excep-
 tion, and within the reasoning of that passage in *Roberts*; at the
 same time, we rely on the three first exceptions, not so much as
 governing the present case, as illustrative of the alacrity exhibited
 by the Courts in admitting what would appear *slight circumstances*
 to bring such settlements as this within the support of a valuable
 consideration.

The first proposition, that a mere verbal engagement before mar-
 riage will support a settlement executed afterwards, is recognised in
 the case of *Griffin v. Stanhope* (a); *Lavender v. Blakstone* (b).

The second exception rests upon the authority of the case of
Jones v. Marsh (c), where the husband, in consideration of an addi-
 tional portion of £100, paid by the wife's mother, settled an estate
 of £100 per annum upon himself for life, remainder to his first and
 other sons, and thirteen years afterwards mortgaged his estate, with
 the usual covenants; and upon his death the mortgagee brought his
 bill against the son to foreclose. The Lord Chancellor said:—
 "It would be very hard to call this a fraudulent settlement, since
 "it is in consideration of a marriage had, and of *an additional*
 "provision of £100 paid by the wife's relations, which cannot be
 "called voluntary against a creditor who lent his money thirteen
 "years after." *Colville v. Parker* (d).

The third exception to the general rule, and which shows still
 stronger the indulgent inclination of the Courts towards these cases
 of settlements after marriage, is illustrated by an *Anonymous*
case (e), where a second marriage settlement was recited to be
 made in consideration that the wife had parted with the former
 settlement, which appeared to be made after the marriage, but was

(a) Cro. Jac. 454.

(b) 2 Lev. 146.

(c) Cas. temp. Talbot, 64.

(d) Cro. Jac. 158.

(e) Pr. Cha. 101.

recited to be made in consideration of a marriage portion secured, but no proof of any previous agreement for such settlement ; yet the Court presumed it, and upon the strength of such presumption deemed the second settlement not voluntary against bond creditors. This illustrates the last exception, as well as that now under consideration ; for the first settlement, the destruction of which gave value to the second, was itself post-nuptial, and was upheld, in consideration of the portion which was secured at the time of its execution. This exception is further sustained by the case of *Scot v. Bell* ; and *Ball v. Burnford* (a) shows that the valuable consideration of the post-nuptial settlement will extend to those who were utter strangers to the previous instrument.

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But where a post-nuptial settlement cannot be executed without the *mutual concurrence* of the parties to it, and where such concurrence is stipulated for, and more especially where the concurrence of one party is paid for by the other, these circumstances are in themselves sufficient to repel what is called statutory fraud, and to invest the transactions with the reality of a contract : *Doe d. Hamerton v. Mitton* ; *Middleton v. Lord Kenyon* (b) ; *Osgood v. Strode* (c) ; *Pulvertoft v. Pulvertoft* (d). These cases show that the concurrence of a party, whose concurrence is necessary, will make limitations in a settlement good and valid, which, but for that circumstance, would be unquestionably voluntary. *Russell v. Hammond* (e) ; *Parker v. Carter*.

In *Muskerry v. Chinnery*, the settlement was distinctly held by Sir E. Sugden, and by the twelve Judges in Error, and by the House of Lords, who adopted the opinion of the Judges, to be a settlement for good and valuable consideration : and that case cannot in this respect be distinguished from the case before the Court. In these cases the mere concurrence of parties, whose concurrence was essential to the execution of the deeds which they executed, was held to impart value to all the limitations which those deeds contained ; therefore we say here, without at present adverting to any

(a) Pr. Cha. 113.

(b) 2 Ves. jun. 391.

(c) 2 P. Wms. 245.

(d) 18 Ves. 92.

(e) 1 West, 535.

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stronger argument, that the concurrence of R. Usher in the fine levied by him and his wife imparts value to every limitation in the deed which leads the uses of it. His concurrence was essential, and it is not to be presumed that he gave it for nothing. One consideration which he got for that concurrence was a joint power of appointment among his own children by her. It is laid down in *Cruise Dig.* :—" If a married woman levies a fine of her own inheritance without her husband, it will bind her and her heirs, because they will be estopped to claim any thing in the lands, and cannot be admitted to aver that she was a married woman, that being contrary to the record ; but her husband may enter and defeat such fine, either during the coverture to restore himself to the freehold which he held *jure uxoris*, or after her death to restore himself to the tenancy by the courtesy ; because no act of a *feme covert* can transfer that interest which the marriage has vested in the husband ; and if the husband avoids the fine during coverture, neither the wife nor her heirs will be barred by it ; for by the entry of the husband the whole estate which passed by the fine is defeated, and the old estate of the wife revested in her, and then her husband becomes again seised in right of his wife." It might well be presumed therefore that his consent to deprive himself of these great privileges given him by the law was purchased by the limitations in favour of his own children ; the more readily as, in the deed leading the uses, the agreement was that the fine should be levied for the purpose of providing for Robert Usher himself, and making provision for the issue of the marriage. It is impossible to refer his concurrence in the fine to any thing but the contract appearing upon the deed which preceded it, the purpose for which it was then agreed to be levied. But not only was *he* a purchaser from *his wife* for himself and his children by her, by his concurrence in the fine, but *she was a purchaser from him* for the same children of the power which he gave her of appointing among them, the consideration given by her being the sum of £2000, which she empowered him to raise for his own use, and the ultimate limitations to his own right heirs. He *sold* her this power—she *bought* from him his concurrence in the fine for a sum of £2000 sterling, and for an ultimate limitation of

the property for himself. It is the circumstance that the property moved from the wife which makes the present settlement, upon this branch of the case, undistinguishable from *Sheehy v. Muskerry* (a). The position of a *feme covert*, with respect to her property, is very peculiar, and very different from the position of her husband with respect to his own; over his own he has the absolute dominion; she is wholly powerless as to the disposition of hers. A power of disposition therefore over her property by a *feme covert* is an object so important, that she ought not spare any expense to obtain it. Accordingly, in the settlement now before the Court, this power has been stipulated for, and has been bought with a price: *Bennett v. Bernard* (b); *Middleton v. Lord Kenyon*. In that case the charging an estate by a son, which, but for that act of his, would not have been liable to the demands of the father, is a good consideration to support the limitations both of that and the other estates. So here, the charging her estate by the wife with a sum of money for her husband, which, but for that act of hers, could not affect it, is a good consideration for the other limitations contained in the deed: *Heap v. Tonge* (c.)

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Upon the second question, we submit that the lease is not warranted by the power contained in the settlement—it exceeds both the letter and the spirit of the power, and is at variance with the whole tenor of the instrument creating it.

No case has ever gone the length of deciding that a lease reserving such rent as the donee of the power may think fit, warrants him in taking a fine from the lessee. *Talbot v. Tipper* is thought to have gone very far in authorising the donee of such a power to make a lease not reserving any rent at all; but as its language would have empowered him to reserve a peppercorn, payable forty years after, the Court conceived there was no substantial difference between such a reservation and the case before it. The lease was conformable to the literal tenor of the words in which the power was given; and therefore, as said by Baron Alderson, in *Sheehy v. Muskerry*, “the remainderman has no reasonable ground for

(a) 1 H. L. Cas. 576.

(b) 10 Ir. Eq. Rep. 584.

(c) 29 Law Jour. 661.

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 "power who had the *jus disponendi* contemplated." How can it be
 said that the framers of the power in the present case contemplated
 fines when they used the word "rents?"—the literal tenor of the
 word "rent" does not certainly include a fine. If the doctrine now
 contended for be correct, the leasing power in *Sheehy v. Muskerry*
 might have been sustained by its application to that case; and yet
 neither the arguments for the plaintiff, nor the decision of the
 Judges, had any reference to it. The struggle in that case was to
 connect the words, "with or without fines," which are to be found at
 the conclusion of the power, and which are apparently attached to
 the latter clause only, to the first clause also. But the first clause as
 it stood, and without the addition of those words, "with or without
 fines," would have authorised the leases in that case, if the position
 of the present plaintiff be correct. This case therefore is, at least
 negatively, a decision in our favour.

But apart from the literal words, is there any thing in this settlement which will warrant a more liberal construction of it than its language would import? On the contrary, we submit that its object and its provisions are inconsistent with any other construction than that contended for by us. The primary object of the settlement of 1837 was to provide for the children of the marriage; and it would be wholly inconsistent with this design to permit the tenant for life to alien the inheritance, unless the language as in *Sheehy v. Muskerry* expressly, and in terms, authorised him to do so. Unless a fine is permitted to be taken under such a power as the present, common prudence would restrain the tenant for life from making a lease, to the injury of the remaindermen, for such lease would be no less injurious to himself. It is no answer to say that no harm is done here to those in remainder, as the tenant for life might have leased at a peppercorn, and thus have placed them in a worse position than they are at present. They are entitled to the safety and protection which they have in the self-interest of the donee of the power, if it is construed according to its literal import; but which self-interest no longer exists, for the interest of the tenant for life is no longer their interest, if the construc-

tion contended for is allowed to prevail. Again, the husband in the present case is empowered by the settlement to raise by mortgage £2000 for his own use. This negatives the idea of his being allowed to raise more than that sum by any other means—"expressio unius est exclusio alterius." Besides, suppose that he exercises his power of mortgaging, and thus under the leasing power aliens the estate, what security is in such case left to the mortgagee? In this case there is no ambiguous meaning in the terms used; and, without speculating upon the intention of the framer of the power, it would be impossible to hold that by the word "rent," he intended to include "fines."

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R. W. Greene, in reply.

As to the first question, whether as against the plaintiff claiming under the lease of the 23rd of June 1838, the limitations in favour of children, in the settlement of the 19th of June 1830, are fraudulent and void within the meaning of the statute? It is not whether the whole settlement is void, but whether as against a subsequent purchaser for valuable consideration the limitations to the children are voluntary? If voluntary, the effect of the statute is to avoid them as to such purchasers.

Are then those limitations in point of law founded upon such a valid consideration as to give them efficacy within the meaning of the statute against a purchaser admittedly for valuable consideration? This is not a settlement for the valuable consideration of marriage. Marriage is *per se* a valuable consideration, not only as to husband and wife, but as to children. Children, therefore, in the case of an ante-nuptial settlement are purchasers—collaterals are not; but in the case of post-nuptial settlements a child is not a purchaser. He may become an object of valid limitation by being purchased for, that is, he may be within a contract or bargain made for him, but he is just in the same position in this respect as any other person in the community—he is to all intents and purposes a volunteer. His claims require the same support in the way of consideration, and they are defensible just in the same way as those of any other stranger; consequently the same person or persons

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But it is said here that there was a good consideration, viz., the concurrence of the husband and wife; that is, that because neither could make the settlement without the aid of the other, therefore that concurrence was in itself a valuable consideration. Now what is the extent of the argument? That no settlement of the wife's property could be voluntary; the proposition must go to that extent. This is against principle and authority, the proposition therefore must be limited, and something else must be looked for in the way of consideration. Now the meaning of consideration is, some consideration accruing to the person who owns the estate, to the person whose estate is settled. What consideration moved to the wife? None, not one provision in the deed is for her benefit. She was owner in fee, subject to a contingent life estate in her husband. If she had not executed the deed, the estate would have gone to her daughters as co-heiresses; every thing done by the settlement is done to her prejudice; she gives every thing and takes nothing; even the provision for the children was for the husband's benefit, because it is the father, and not the mother, who is bound to provide for the children. If therefore there was a question between the wife surviving, and a person claiming under the husband, she might well say, that even as between themselves no consideration moved to her; suppose it had been articles, and a specific execution were sought against her, she might well defend herself on that ground.

But it is not a case between the husband on the one hand and the wife on the other, but between the husband and wife on the

(a) 2 Keen, 81.

(b) 7 Sim. 3.

one hand, and the children on the other. The question is, what consideration did those children give to their father and mother? Upon looking to the authorities it will be found that that is the real question. In the cases cited on the other side, one of the parties to the settlement, or some party deriving under him, sought without the consent of the other to defeat the settlement. In *Parker v. Carter*, the person who attempted to defeat the settlement was the heir of one of the parties. In *Clayton v. Hunter*, the question was, whether a limitation in any ante-nuptial settlement in favour of the sons of a second marriage was good as against purchasers? It appeared that that limitation was interposed between the limitations to sons of the first marriage, and daughters of the first marriage, and it was held good—a totally different case from the present. *Bennett v. Bernard* is no authority in the present, because it came on afterwards before the Chancellor, and was compromised. In *Middleton v. Lord Kenyon*, an arrangement was made by father and son for payment of debts and re-settling the estate; the father alone filed a bill to impeach the deed, and it was held that as against him it was not voluntary. *Fitzmaurice v. Sadlier* (a) was a question raised by a purchaser from the husband alone; that was, whether he could defeat a settlement made by himself and his wife? and it was held that as between them there was a sufficient consideration. From all the cases it appears that one of the persons contracting, or a person deriving under him, cannot impeach the deed where as between those two there has been consideration.

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But what is the case here? Both the contracting parties make an alienation, the effect of which is to displace a limitation which as against them is clearly voluntary, absolutely without any consideration at all. How can these parties, claiming under that voluntary limitation, say to the purchaser from both the parties to the contract, that they will insist on the benefit of that limitation? The case of *Goodright v. Moses* is *fortiori* in our favour. There, as here, the wife's estate was settled after marriage: the case was stronger than the present; for there the wife alone, one of the settlors, made

(a) 9 Ir. Eq. Rep. 595.

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the lease, whereas in the present case the lease was made by both husband and wife. That case of *Goodright v. Moses* was distinctly recognised and acted on by Lord Cottenham in *Currie v. Nind*, and that was a strong case, because it was a bill filed for specific execution, and the Court compelled the purchaser to take the title. The Master of the Rolls says:—"Upon the second and third objections, I am of opinion that the property in question being the property of a married woman, and the settlement being made during coverture, does not prevent the statute of *Elizabeth* operating upon it. *Goodright v. Moses* is decisive as to this; it is like the case where by a new arrangement made between parties the limitations of a voluntary settlement are defective: *Ravenshaw v. Hollier*." The principle of the cases seems to be, that when owners of property dispose of it by an arrangement between themselves, to which no third person is a party, they may afterwards alter the disposition of it by mutual agreement. So here, the husband and wife by a post-nuptial settlement dispose of her property, and afterwards sell it to a purchaser, and if a sale be good, then a lease would be equally good.

As to the second point, this lease was warranted by the power. It has been argued as if nothing could be done under a power unless the power expressly authorises the thing to be done, as if the *onus* of supporting the lease was thrown on the lessee, and he was obliged to show that the particular species of lease was expressly contemplated and provided for by the power, whereas it is the very reverse; if the words were "powers to lease," any lease might be made—it is for them who impeach the lease to show that it violates some restrictions or conditions; any power is a reservation of so much of the original dominion. The settlors of this estate choose to reserve the right to make any lease they think fit. No, says the remainderman, you have not a right to make any lease. Unless there be something to limit the right, the lease is good.

But supposing that the deed was not voluntary as to authorise a subsequent alienation or lease without the aid of a power, then the power here was abundantly large to authorise the lease. The Court is not called upon or authorised to add or insert any qualifications

not contained in the power itself. A remainderman has no equity entitling him to call upon the Court to do so. He takes only what the parties to the settlement may choose to give him. He can take what they have not thought fit to reserve to themselves. The question then really is, what is there reserved? This must be determined by the words of the instrument. This is not a question of equitable, but of legal, construction. If the lease be warranted by the legal construction of the power, this Court cannot say it is invalid. Now nothing can be more unlimited than the power. No amount of rent is required—no limit of demise is assigned. It may be a lease for ever, a lease of any description containing any terms, altogether at the discretion of the donee: *Talbot v. Tipper (a)*; *The Attorney-General v. Wray (b)*. How can it be contended here that the lease is not within the express terms of the power? The only ground upon which a lease could be invalid is excess; and it lies upon the party impeaching the lease to prove such excess. You can only invalidate such a lease by showing that it wants an ingredient which the power requires—not that it has an ingredient which the power does not require.

As to this being a concurrent term, or a lease *in futuro*, it is wholly unnecessary to discuss the matter—for the answer is, the power is unlimited.

Cur. ad. vult

The Judges gave the following certificate:—

This case has been argued before us, and we are of opinion, First—That as against the plaintiffs claiming under the lease of the 23rd of June 1838, executed by Robert Usher and Helen his wife to the plaintiff, the limitations in favour of the children in the same indenture of settlement, bearing date the 19th of June 1830, were not fraudulent and void within the meaning of the Act of the 10 *Car.* 1, sess. 2, c. 3.

(a) *Skin.* 427.

(b) *Jac.* 307.

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Secondly—That the lease of the 23rd of June 1838 was a valid execution of the power of leasing contained in the said settlement of the 19th of June 1830.

P. C. CRAMPTON.

L. PERRIN.

R. MOORE.

31st January 1852.

In the Matter of the Estate of ANDREW ENGLISH.*

Jan. 30.

R. M., being seised to him, his heirs, &c., of the lands of L. for a term of three lives, with covenant for renewal, devised to R. C. and his heirs all his property, real and personal, except as hereinafter excepted, and subject to all his debts and legacies. He also bequeathed an annuity to his wife, and a legacy to be paid by R. C., and a further legacy of £500, to be disposed of by her will to her grand-daughters, in such

THIS was a case sent from the Incumbered Estates Court for the opinion of this Court.

It stated that Richard Musgrave, of Littlebridge, in the county of Waterford, being seised to him, his heirs and assigns, of the lands of Littlebridge for a term of three lives, with a covenant for perpetual renewal, devised the same in the terms following:—"I leave and bequeath to my grandson Richard Chearnley and his heirs for ever all my property, real and personal, of every kind, in Ireland and England, except as hereinafter excepted or otherwise disposed of, subject nevertheless to all my debts and legacies as hereafter expressed." After a bequest of an annuity of £200 to his wife, and a legacy of £50 to be paid to her by the said Richard Chearnley in one week after testator's decease, to buy mourning, and a further legacy to her of £500, as a token of testator's love and regard, to be disposed of by her by her will to her grand-daughters in such proportions as she should direct; it then proceeded as

proportions as she should direct. Testator then bequeathed to A. E. his house and lands of L., in trust for his son R. E., together with the appurtenances, he not to commit waste, the said A. E. to remain and occupy the premises during his life, and then his son to succeed him; and in case R. E. should die before his father, then A. E.'s second son, if surviving his father, was to be in his place and stead.

Held, that R. E. took an estate *quasi fee* in the house and lands of L.

* BLACKBURNE, C. J., *absente*.

follows :—“ I leave and bequeath to my son-in-law Andrew English
 “ my house and lands of Littlebridge, in trust for his son Richard
 “ English, together with the appurtenances thereunto belonging,
 “ timber and trees of every kind, and not to commit waste of any
 “ sort ; the said Andrew English to remain in and occupy the said
 “ premises during his natural life, and then my grandson to succeed
 “ him ; but should my daughter Susanna English survive her hus-
 “ band the said Andrew English, then my will is, that she continuing
 “ unmarried shall enjoy the said house and lands during her natural
 “ life ; and in case that my said grandson Richard English should
 “ die before his father and mother, then and in such case it is my
 “ will that my grandson Christopher English, if surviving his
 “ brother, shall be in his place and stead. Also I leave and be-
 “ queath to my said son-in-law Andrew English all my interest
 “ and holdings of Clonmel commons as held by me, in trust for my
 “ said grandson Richard English, the said Andrew English to pos-
 “ sess and enjoy the same during his natural life. I do this because
 “ I think my said son-in-law will make that holding a beneficial one
 “ for his son, though I did not, and because it was formerly held by
 “ said Andrew English’s father. It is my will also that, on failure
 “ of my said grandson Richard English, my grandson Christopher
 “ shall stand in his place and stead ; and as my son-in-law Andrew
 “ English holds under me the lands of Knockinbrodane, &c., under
 “ the yearly rent of £400, and has no lease of the same, my will is
 “ that my grandson Richard Chearnley shall give my son-in-law a
 “ lease for lives renewable for ever of the aforesaid lands at the
 “ above rent of £400, and paying on the fall and renewal of every
 “ life ten guineas as a renewal fine to my grandson Richard Chearn-
 “ ley, his heirs and assigns, the said lease to be in trust for my
 “ grandsons Richard English and Christopher English successively
 “ after the death of my son-in-law Andrew English.”

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Richard English survived the testator, and also survived Andrew and Susanna English, his father and mother, and his brother Christopher, and died in June 1851, leaving Andrew English his eldest son. Susanna English survived her husband. Richard Chearnley was dead, having by his will, dated in 1791, devised all his estates

H. T. 1852. to his brother Anthony. Anthony died, leaving Richard Chearnley
Queen's Bench his eldest son and devisee.

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 ENGLISH.

The question sent for the opinion of the Court was, "What
 "estate did Richard English take in the lands of Littlebridge under
 "the will of Richard Musgrave?"

R. Longfield (with him *Deasy*), on behalf of Richard Chearnley.

Richard English took under this will only a life estate. The clause directing that he is not to commit waste of any sort clearly shows the intention was to confine his interest to a life estate. Here there are no words of limitation, which are necessary, or at least equivalent, to an intention to pass the entire interest: *Crozier v. Crozier* (a); *Doe d. Jeff v. Robinson* (b); *Allen v. Allen* (c). The use of the words house and lands only denotes the locality of the premises, but convey no interest. Here the testator omitted words of limitation, and it is clear he did so intentionally; for he gave to Richard Chearnley all his estate, showing thereby his intention was to limit the estates given to the other devisees. In *Barnacle v. Nightingale* (d), a testator devised lands to his son A. T. for life, and after the decease of A. T., to his first son lawfully issuing, and for default of such first issue to the use of the second, third and every other son, and the heirs of his and their bodies, the elder to be always preferred before the younger of such sons, and the heirs of his body; and for default of such issue, then to the use of all and every the daughters of A. T., and the heirs of the body of such daughter and daughters, with remainders over. It was held that the first son of A. T. took neither by construction nor by implication an estate tail, but a life estate only. So also in *Foster v. Romney* (e), it was held that a life estate only passed, there being no words of limitation. *Bevan v. White* (f); *Cook v. Gerrard* (g). But it is contended that by the substitutional devise that this conditional limitation gave a fee-simple. But in *Purefoy v. Rogers* (h), it is decided if a contingent remainder cannot take effect on the

(a) 5 Ir. Eq. Rep. 415.

(c) 4 Ir. Eq. Rep. 472.

(e) 11 East, 594.

(g) 1 Saund. 180.

(b) 8 B. & C. 296.

(d) 14 Sim. 456.

(f) 7 Ir. Eq. Rep. 473.

(h) 2 Saund. 380.

determination of the particular estate, in what way soever it is determined, it cannot vest afterwards, though the particular estate should revive. *Frogmorton v. Holyday* (a) may be relied on; but in that case the testator clearly showed an intention to give the fee. *Morgan v. Griffiths* (b).

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Wheeler, with him *J. D. Fitzgerald*, contra.

The manifest intention of the testator was to dispose of all his property, for he begins with a gift of all, and the will contains no residuary devise. Richard English was evidently the principal object of the testator's bounty, and it cannot be supposed that he intended to give only a contingent life estate to him. If the construction contended for on the other side were to be supported, the clause substituting Christopher, in the event of Richard dying before his father and mother, would be unintelligible. If an indefinite devise were made to A, with a devise over on contingency, it is settled that gives the whole estate to A: *Doe. d. Wight v. Cundall* (c); *Marshall v. Hill* (d); *Toovey v. Bassett* (e); *Spry v. Bromfield* (f). In that case a testator devised his real estates after the decease of his wife to J. B., but at his death the whole to be for J. B.'s wife and children, and which children, at the death of their mother, should inherit the same jointly during their lives; and if the said children should die before they arrive at the age of twenty-one, the testator willed that the estates should go to A, and to the use and benefit of him and his children; and it was held that the surviving children of J. B. took an estate in fee-simple as tenants in common in the estates in question. The rule therefore is not confined to the contingency of the party dying under twenty-one. *Robinson v. Gray* (g); *Driver v. Frank* (h); *Moore d. Fagge v. Heaseman* (i); *Burton, Real Property*, p. 128: the intention was to give the trustee the entire estate in trust for the father and mother, remainder to Richard in fee, contingent on his surviving—

(a) 3 Burr. 1618.

(b) Cowp. 235.

(c) 9 East, 400.

(d) 2 M. & Sel. 608.

(e) 10 East, 460.

(f) 7 M. & W. 545.

(g) 9 East, 1.

(h) 6 Price, 41.

(i) Willes, 143.

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[PERRIN, J. The devise to Christopher may be considered as an executory devise.]—*Kirby v. O'Hea* (a).—[CRAMPTON, J. It is very material to know the extent of the estate given to the trustee.—MOORE, J. If Richard took only a life estate, there would be no estate to serve the devises to the mother and the two sons.]

Deasy, in reply.

Andrew English took only an estate for life as trustee, and it rests with the parties seeking to take advantage of the devise to show that it comes within the authorities relied on. Andrew took the legal and beneficial interest during his own life, and the word "succeed" only means that the person is to succeed in occupation; it is not used in the strict legal sense—that is, as an estate passing by succession. If the construction contended for on the other side be correct, it would give the fee to Richard; but if he had a son, it would take it away from him in event of Richard not surviving his father and mother. This devise over will not enable the Court to expand the terms of the executory devise and give Richard a fee. The intention was to give the whole estate to Andrew, then to Richard, and on failure of Richard, that is, in the event of his dying in the lifetime of Andrew.—[PERRIN, J. I think that the plain inference to be drawn from the words of the will was, that Richard should, on the death of his father and mother, succeed to the whole interest.]—If the word "succeed" would be satisfied by giving a life estate, the Court ought to assume an intention in favour of the heir-at-law.

Cur. ad. vult.

The Court gave the following certificate :—

This case has been argued before us; and we are of opinion that the said Richard English in the case mentioned took an estate *quasi* fee in the house and lands of Littlebridge, under the will of Richard Musgrave.

P. C. CRAMPTON.

L. PERRIN.

R. MOORE.

January 31, 1852.

(a) 2 Ir. Eq. Rep. 424.

H. T. 1852.
Each. Cham.

Exchequer Chamber.

M'CREERY v. LUTTRELL.

(Error from the Court of Queen's Bench.)

COVENANT, for non-payment of rent.

Jan. 21.

The declaration stated that the Earl of Carhampton, being seised in fee of certain premises, by indentures of lease and re-lease, bearing date respectively the 9th and 10th of May 1792, bargained, sold, released and confirmed unto William Drought, his heirs and assigns, the said premises: to hold the same from the 25th of March 1792, for the lives of M. D., D. F. and J. M., and the survivors and survivor of them (with a covenant for perpetual renewal), yielding and paying the yearly rent of £40. That William Drought did thereby, for himself, his heirs, executors, administrators and assigns, covenant to pay the rent to the Earl of Carhampton, and that the Earl of Carhampton did, for himself, his heirs, &c., covenant with William Drought, that upon the death of any of the lives, on payment of a

A, in 1792, by indentures of lease and re-lease, conveyed certain premises for three lives to B, at the yearly rent of £40. This indenture contained a covenant by A for himself, his heirs, executors, administrators and assigns, with B, that upon the death or any of the lives, he A would add and

insert to the time and term thereby granted the life of such person as might be named, which nominated life was to be indorsed on the indenture, or written on a deed, label, or parchment, to be affixed to the indenture, or in a separate deed or writing, declaring the life or lives failing, and the life and lives so to be added in lieu thereof; and also a covenant by B for himself, his heirs, executors, administrators and assigns, to pay the rent. By indenture of 1818, reciting that the interest of A in said premises was then vested in C, and that of B in D, and that one of the lives in the original lease was dead, and that D had applied to C to execute a renewal by the insertion of a new life, to which C had agreed; it was witnessed that in pursuance of the covenant for renewal in said lease contained, C had added and inserted a new life to the term of said lease, *Habendum*, for said life, &c., *subject to the yearly rent of £40, and to all and singular the covenants and agreements in said indenture contained.* D assigned over to a third party in 1845.

Held, in an action of covenant against D, for the non-payment of rent accruing due after the assignment of 1845, that D did not thereby discharge himself of his liability under the renewal of 1818, the words "subject to the rent and covenants" creating an express covenant, and such appearing on the face of the deed to be the intention of the parties.—[CRAMPTON, J., *dissentiente*.]

Held, per MOORE, J., and BALL, J., that the parties to the deed of 1818 not being parties to the original lease, but assignees thereof, the deed of 1818 could not operate by way of enlargement so as to create a legal estate for the additional life thereby inserted, but operated as a release of the reversion.

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peppercorn fine, he would add and insert to the time and term thereby granted the life of such person as might be named, which nominated life was to be indorsed on the indenture, or written on a deed, label or parchment, to be fixed to the indenture, or in a separate deed or writing, declaring the life or lives failing, and the life and lives so added in lieu thereof (*Profert*):

It then stated that during the existence of two of the lives, the third one dropped on the 1st of April 1818, and that on the 21st of April 1818, by indenture made between Henry Luttrell and Thomas M'Creery (*Profert*), reciting that the estate and interest of the Earl of Carhampton in the premises was legally vested in Henry Luttrell, and that the estate and interest of William Drought was vested in Thomas M'Creery, and that J. M., one of the lives in the indenture of the 10th of May 1792, was dead, and that M'Creery had applied for a renewal thereof, by inserting the life of the Duke of Leinster, that he (Luttrell) added the life of the Duke of Leinster to the time and term granted by the original indenture: To hold the premises unto M'Creery, his heirs and assigns, for and during the life and lives of M. D., D. F., and the Duke of Leinster, and the survivors and survivor, subject to the yearly rent and to the covenants in the indenture of the 10th of May 1792 contained. That M'Creery, by said last mentioned indenture, covenanted to pay the rent on every 29th day of September and 25th day of March; that the last mentioned term still continued, the life of the Duke of Leinster being still in being; and that on the 25th of March 1849, the sum of £60 for one and a-half year's rent was and still is in arrear.

Breach—Non-payment of the same.

The defendant craved oyer of the deed of 1818, which was as follows :—

“ This indenture, made the 21st of April 1818, between Henry
 “ Luttrell of, &c., of the one part, and Thomas M'Creery of, &c., of
 “ the other part: Whereas by indenture of lease bearing date the
 “ 10th day of May 1792, and hereunto annexed, Henry Lawes Earl
 “ of Carhampton, for the considerations therein mentioned, did demise
 “ and set unto William Drought of, &c. (in his actual possession then

“ being, by virtue of a bargain and sale therein recited), all that and
 “ those the dwelling-house, &c.; situate in the city of Dublin, as then
 “ held by the said William Drought, to hold to the said William
 “ Drought, his heirs and assigns, for the lives of M. D., D. F. and
 “ J. M., at the yearly rent of £40, payable half-yearly, in which
 “ said lease is contained a covenant for the perpetual renewal thereof
 “ on the payment of a fine of one peppercorn: And whereas the
 “ estate and interest of the said Earl Carhampton in the said
 “ premises is now legally vested in the said Henry Luttrell, and the
 “ estate of the said William Drought therein is now legally vested
 “ in the said Thomas M’Creery: *And whereas the said John*
 “ *Moore, one of the lives in the said lease mentioned, is dead, and*
 “ *the said Thomas M’Creery hath applied to the said Henry*
 “ *Luttrell to execute a renewal thereof, by inserting the life of*
 “ *the Duke of Leinster in the place and stead of the said John*
 “ *Moore, to which the said Henry Luttrell hath agreed.*

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“ Now these presents witness that the said Henry Luttrell, in
 “ *pursuance of the covenant for renewal* in said lease contained,
 “ and for and in consideration of the fine of one peppercorn to the
 “ said Henry Luttrell paid on the perfection hereof by the said
 “ Thomas M’Creery, the receipt whereof is hereby acknowledged,
 “ *hath added and inserted, and by these presents doth add and insert*
 “ *to the time and term of said lease* the life of Augustus Frederick
 “ Duke of Leinster, *to have and to hold the said premises, with the*
 “ *appurtenances, unto the said Thomas M’Creery, his heirs and*
 “ *assigns, for and during the natural life and lives of the said*
 “ *Mary Drought, David Fleming and Augustus Frederick Duke of*
 “ *Leinster, and the survivors and survivor of them, and for and*
 “ *during the natural lives of all and every such other person and*
 “ *persons as shall from time to time for ever hereafter be added to*
 “ *the time and term of said lease, in pursuance of said covenant for*
 “ *the perpetual renewal thereof as in said lease mentioned, subject to*
 “ *the said yearly rent of £40 sterling, and to all and singular the*
 “ *covenants and agreements* in said indenture of lease contained, and
 “ which on the tenant or lessee’s part are or ought to be paid, done
 “ and performed.”

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The defendant then pleaded, that after the making of the said demise in the declaration mentioned; and of said indenture of the 21st day of April 1818, and before any part of the rent in the plaintiff's declaration mentioned became due or payable, to wit, on the 5th day of February, in the year of our Lord 1845, in the county of the city aforesaid, he the said defendant, by a certain indenture of assignment by him then made, and duly signed by the defendant, and sealed with his seal, for the consideration therein mentioned, did bargain, sell, assign, transfer and set over unto Patrick Roache, his heirs and assigns, all the right, title, property, interest, claim and demand whatsoever of him the defendant, of, in and to the said demised premises, with the appurtenances, to have and to hold to the said Patrick Roache, his heirs and assigns; by virtue of which said indenture of assignment the said Patrick Roache afterwards, to wit, then and there entered into the said demised premises with the appurtenances, and became and was thereof possessed and seised for the said three lives, whereof the plaintiff on the day and year at the place aforesaid had notice; and the defendant further saith that the plaintiff, after the entry of the said Patrick Roache into the said demised premises, with the appurtenances, under and by virtue of the said assignment, to wit, on the 29th day of September, in the year of our Lord 1845, in the county of the city aforesaid, did accept and receive a large sum of money, to wit, the sum of £20, late Irish currency, for the rent of the said premises, with the appurtenances, in form aforesaid reserved and made payable, and then and there accepted the said Patrick Roache as his tenant of the said demised premises, with the appurtenances.—

Verification.

The defendant pleaded, secondly, *non est factum* to the deed of April 1818, and issue was joined thereon.

.General demurrer by the plaintiff to the first plea, and joinder by the defendant.

Demurrer allowed, and judgment for the plaintiff.*

On this judgment the plaintiff (in error), the defendant below, brought a writ of error.

* See *Luttrell v. M'Creery*, 1 Com. Law Rep. 7.

J. T. Ball and *D. Lynch* were heard for the plaintiff, and *H. T. 1852.*
Ormsby and *Napier* for the defendant. *Exch. Cham.*

The following authorities were relied on : *Bachelour v. Gage* (a); *Fisher v. Ameers* (b); *Auriol v. Mills* (c); 1 *Saund.* p. 241 c; 1 *Fur. L. and T.*, p. 190; *Farran v. Beresford* (d); *Murphy d. Webb v. Russell* (e); *Iggulden v. May* (f); *Nugent d. Atkins v. Sealy* (g); *Platt on Covenant*, p. 42, *et seq.*; *Wolveridge v. Stewart* (h); *Bac. Abr., Covenant b*; *Doe d. Jackson v. Ashburner* (i); *Drake v. Munday* (k); 2 *Platt on Leases*, p. 23, *et seq.*; *Shove v. Pincke* (l); *Porter v. Sweetman* (m); *Llewellyn v. Earl of Jersey* (n); *Worsley v. Wood* (o); *Williams v. Burrell* (p); *Curry v. Stanley* (q); *Broom's Maxims*, p. 238; *Spyne v. Topham* (r); *Woodham v. Marlow* (s); *Chancellor v. Poole* (t); *Tilden v. Walter* (u); *Doe d. Raims v. Kneller* (v); *Harrold v. Whitaker* (w); *Holles v. Carr* (x); *Hopkins v. Murray* (y); *Platt on Covenants*, p. 355.

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Cur. ad. vult.

MOORE, J.

This case comes before the Court on a writ of error brought to reverse the judgment of the Court of Queen's Bench. That judgment was given in favour of the plaintiff below on a demurrer taken by him to the defendant's pleas.

Jan. 21.

(a) *W. Jones*, 223.

(b) 1 *Br.* 20.

(c) 4 *T. R.* 94.

(d) 2 *H. & Br.* 306.

(e) 3 *T. R.* 393.

(f) 9 *Ves.* 330.

(g) *A. & N.* 359.

(h) 3 *Tyr.* 637; *S. C. 2. M. & S.* 75.

(i) 5 *T. R.* 163.

(k) *Cro. Car.* 207.

(l) 5 *T. R.* 124.

(m) *Styles*, 406.

(n) 11 *M. & W.* 183.

(o) 6 *T. R.* 710.

(p) 1 *C. B.* 402.

(q) *H. & J.* 487.

(r) 3 *East*, 115.

(s) 1 *H. Bl.* 438, n.

(t) 2 *Doug.* 764.

(u) 1 *Sid.* 447.

(v) 4 *C. & P.* 3.

(w) 11 *Q. B., N. S.* 147.

(x) 3 *Swanst.* 647.

(y) 12 *Ir. Law Rep.* 359.

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The entire question depends on the construction of the deed of 1818 ; and that question is, whether that deed contains an express covenant between the plaintiff and defendant ? If it does, it is plain that the defendant could not, by an assignment over, relieve himself from his liability on foot of that covenant.

It is stated in that deed that the plaintiff Luttrell was the assignee of the reversion, and that the defendant M'Creery was the assignee of the lessee ; the defendant was therefore the person entitled to the benefit of the covenant of renewal, and the plaintiff was the person bound and capable to execute it.

I apprehend that under a covenant for perpetual renewal, the lessee or his assignee is entitled to have a constantly subsisting estate for three lives ; and, on the other hand, that the lessor or his assignee is entitled to have the personal security of his grantee for payment of the rent and performance of the other covenants. In *Vance v. Lord Ranfurly* (a), the Lord Chancellor there says :—" It appears to me to be a plain proposition that a covenant for renewal is a covenant to grant an estate, and implies the insertion of such covenants as are incidental to the legal estate, having regard to the tenure ; and a covenant for a lease contains a contract that it shall be accompanied by the ordinary covenants. The lessee is entitled to them, and the landlord is entitled to them ; and so a covenant to grant a renewal, generally speaking, implies a covenant to grant an estate with the same covenants and incidents." It appears to me that where parties having rights execute a deed respecting them, it is a fair and reasonable intendment that the object of the deed is to give effect to these rights.

The deed of 1818 recites the lease of 1792, the covenant for perpetual renewal, the death of one of the lives, and the nomination by M'Creery of the life of the Duke of Leinster in his stead, and that he applied to the plaintiff to execute a renewal by inserting the life of the Duke. The deed then states that Luttrell, " in pursuance of the covenant of renewal, hath added and inserted, and by these presents doth add and insert, to the time and term of the said lease the life of the Duke of Leinster, *to have and to hold* the said

(a) 1 Ir. Ch. Rep. 339.

“premises to the said M’Creery, his heirs and assigns, for and during
 “the natural life and lives of the said Mary Drought, David Fleming
 “and the Duke of Leinster, and the survivors and the survivor of
 “them; and for and during the natural life of all and every such
 “other person and persons as should for ever thereafter be added,
 “pursuant to the covenant for perpetual renewal.” It appears to
 me from this part of the deed, to be the clear and expressed object
 of the parties that M’Creery should have a subsisting legal estate
 for the lives of the three persons named; and I think the Court is
 bound to give to the deed *that* construction, if the words used and
 the rules of law admit of it.

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It has been contended by the Counsel for M’Creery, that the deed operated by way of enlargement, and thereby created a legal estate for the life of the Duke. I think that as the parties to this deed are not the original parties to the lease containing the condition, but are their assignees, the *Case of Lord Stafford* (a) is an express authority against the application of the doctrine of enlargement in this case.

Is there then any other way by which this deed can operate to give a legal estate to M’Creery for the three lives? I think it may operate as a release of the reversion. M’Creery had a subsisting tenancy for two lives, and could take a release of the reversion, and Luttrell had the reversion and could grant it. There are certainly formal words generally used to convey a reversion, such as “grant, bargain, sell, release,” but they are not indispensable; and I think the authorities collected in *Sheppard’s Touchstone*, pp. 271, 327, and the case of *Shove v. Pinche* (b), establish that if a deed be executed by parties, one of whom is able to grant the reversion, and the other in a position to take it, and that the intention of the parties appear, the deed will operate to transfer the reversion, although it does not contain any of the usual or formal words.

The intention of the parties in this case appears to me to be clear. The tenant, entitled to the benefit of the covenant, asks for a renewal and names a life; the landlord, bound by the covenant, consents to grant it, and both parties declare by their deed that their

(a) 8 Coke, 76.

(b) 5 T. R. 129.

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object is to enable the tenant *to have and to hold* the demised premises for the new life, and that of the two still subsisting. My opinion therefore is, that by this deed M'Creery obtained a good legal estate for the three lives. By this construction the tenant gets what he was entitled to; he is decidedly benefited. Before the deed he had a subsisting lease for two lives, after the deed he has a legal estate for the same two lives, and in addition, that of the one newly named.

As to the merger of the legal estate created by the original lease, that must always be the case whenever the renewal is duly and properly framed; but the covenant for renewal still remains perfect, and though not introduced into the deed of 1818, it is stated by the Lord Chancellor in the case of *Vance v. Lord Ranfurly*, already referred to, not to be the practice to introduce that covenant into renewals.

If this construction be the right one, I think that nothing could be more fair and reasonable than that the tenant, acquiring an additional legal estate, should give to the grantor what he was entitled to, an express personal covenant for payment of the rent.

And then the question is—are there in this deed words sufficient to create a covenant? I think there are. The statement in the deed is, that the grantee is to have and to hold, *subject* to the payment of the rent. It is well settled that no particular words are necessary to create a covenant; and in the case of *Wolveridge v. Stewart* (so often referred to in the argument), the Court of Common Pleas held that the words “subject to” did create an express covenant. And though this decision is overruled in the Exchequer Chamber, yet it was there distinctly laid down that the words “subject to” could create a covenant, though in that particular case the Court was of opinion it did not so operate. I think there is a plain and marked distinction between that case and the present one. In that case the lessee assigned his interest to an assignee, “subject to the rent and covenants in the lease.” The words as used there were capable of two meanings:—one, that they were words of qualification of the contract, and simply meant that the lessee assigned the premises burdened with the incumbrances and

obligations to which they were liable in his own hands. The other meaning was, that they created a covenant. The Court of Common Pleas adopted the second meaning, the Exchequer Chamber adopted the first; but both Courts concurred in thinking that the word "subject" was adequate to create a covenant. In the present case, if I be right in my construction, the words "subject to" could fairly have but one meaning, that of a covenant by the grantee to pay the rent to the grantor.

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If even the argument of the Counsel for M'Creery, on the application of the doctrine of enlargement, be good, I think that the words "subject to" did create a covenant; for it appears to me that when a party applies for and obtains an enlargement of his estate, it is but fair and reasonable that he should personally subject himself to the rent; and therefore if he has ~~used~~ words capable of creating a covenant, they should receive that interpretation.

I have but one more observation, and it is this: that if I am wrong in saying that the deed operated as a grant of the reversion, if the doctrine of enlargement does not apply, as I think it does not, if the argument for M'Creery be right, that the deed does not contain an express covenant, then the deed would be a dead letter, and would be wholly inoperative, except as a nomination of the life. I cannot bring myself to the conclusion that an indenture solemnly executed should be so construed.

For these reasons, I am of opinion that the judgment should be affirmed.

JACKSON, J.

During the discussion of this case, I entertained doubts upon certain points raised by Counsel with reference to the nature and incidents of an estate for lives renewable for ever, and which it was urged were involved in the decision of the question presented for judgment on this record. I am, however, quite satisfied, upon consideration, that those points are beside the question which we are called upon to determine. That question is, whether the defendant, who is assignee of the tenant's interest, under a lease for lives renew-

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able for ever, who has been an executing party to such an indenture of renewal as appears on this record, can discharge himself from liability in an action of covenant for rent, by assigning over before the rent sued for becomes due and payable? And this question depends on the answer to another, namely, does that indenture of renewal which he executed contain an express covenant on his part to pay the rent during the term? for if it does, it appears quite impossible to contend that he can discharge himself from liability by assigning over. The words in the indenture, "subject to the yearly rent," are relied on as being an *express* covenant to pay. What is the transaction which takes place between the plaintiff and defendant in this action? The defendant, as assignee of the tenant's interest, under the lease of 1792, upon the fall of one of the lives in that lease, applies to the plaintiff, as assignee of the lessor, for a renewal. A party claiming a renewal as tenant may fairly be expected to place himself in the situation of tenant, and to make himself liable to the tenant's obligations.

It appears quite unnecessary to inquire whether the indenture of 1818 operated as a new lease, or by way of enlargement—or whether there was or was not a surrender of the old lease of 1792, by accepting the renewal of 1818; or whether all the covenants in the lease of 1792 are or are not embodied by reference in the renewal of 1818; because, whether it operated by way of enlargement of the old, or by creating a new, term, the interest was thereby continued to the defendant and his assigns, and there was certainly nothing unjust or unreasonable in his binding himself to the payment of the rent and performance of the covenants during the renewed term, if he thought proper so to do. If the plaintiff, the landlord, was bound to allow the defendant, as tenant, to enjoy the premises during the term, it would be just and reasonable that the defendant should be bound reciprocally to pay the rent during the term also. But the question is, has the defendant bound himself by his express covenant so to do?

It is to be observed the renewal might have been effected by indorsement on the deed of 1792, or by a deed or label attached to it, or by a separate deed in writing. If the intention of the

parties were not that the defendant should be bound by covenant to pay the rent during the term, why was not the renewal by way of label or of deed poll? Why was it by indenture? It is quite clear that no technical or precise form of words is necessary to constitute a covenant. What was said by a very eminent and learned Judge, Chief Baron Joy, in the case of *Curry v. Stanly* (a), is settled law—"a declaration of the object and intention of the parties amounts to an *agreement*." Now any words *under seal* importing or involving an *agreement* will create a *covenant*: *Com. Dig., Cov. A, 2*; as where it is said: "It is *agreed* that A shall pay "B £10 for his goods; this is a covenant by B to deliver the goods, "the words 'it is agreed,' being the words of both parties. Again, "that the lessee shall have wood, not cutting down trees; this is a "covenant by the lessee that he will not cut down the trees." The case of *Chancellor v. Poole* (b) does not conflict with this view, for there the defendant, who was assignee of the *tenant*, contracted only with his *assignor*, and not with the plaintiff, the landlord, to pay the rent. Lord Mansfield says in that case, "the plaintiff was not a contracting party," and that was the ground of the decision in that case. Now here the plaintiff is a contracting party. The defendant by the indenture contracts with the plaintiff.

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Now let us see is there in the indenture of 1818 a declaration of the object and intention of the parties; for if so there is an *agreement*, and if so, it being under seal, it is a *covenant*. I think there cannot be a more distinct statement of the object and intention of both the landlord and tenant. The words of the deed of 1818 are that the defendant shall hold the premises during the term, and be subject to the payment of the rent during the same term; and the defendant, by executing the deed, admits, under seal, that these are the terms on which he consents and agrees to accept the renewal. The words relied on here by the plaintiff, it must be remembered, are not in a deed poll, but in an indenture *inter partes*, they are therefore the words of both parties. The case of *Burnett v. Lynch* fully supports this view of the subject; for if the assignment there had been by indenture, instead of by deed poll, the

(a) H. & Jon. 494.

(b) 2 Doug. 764.

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words would have been held to operate as an express covenant.

This is not, as has been argued, merely an implied covenant; it is express. This manifestly appears by considering the nature of express and implied covenants. An express covenant is to be gathered from the meaning of the words used by the party to be bound—an implied covenant, from the situation and intent of the parties; in other words, *implied covenants* are such as the law presumes a man undertakes to perform, because reason and justice dictate the performance of them in the circumstances in which he is placed, without any express words used by him.

But the case of *Wolveridge v. Stewart* is relied on as showing that the words, "subject to the payment of the rent," do not constitute a covenant on the part of the assignee of the tenant to pay the rent. If one reads only the marginal note it may appear so; but it is necessary to attend to the facts and circumstances of that case. There a lessee, who had covenanted to pay the rent, assigned his term by indenture, *Habendum* during the term, subject to the payment of the rent, &c. Lord Denman, C. J., states the question to be, whether these words, "subject," &c., are words of agreement, or of qualification or condition? He says:—"The words are part of the *Habendum*, and that being so, they are the words of the grantor, and therefore to be taken most strongly against him; and if these words were not added to qualify the grant, it would operate as conveying a greater interest than the assignor himself had; and these words occurring where words of qualification ought to be found, it was probable they were intended to abridge and qualify the grant; and there is nothing in the indenture to show that they were meant to be used in any other sense." In my judgment, that case does not, by any means, govern the present. The words "subject," &c., in that case were in an assignment of a tenant's interest under a lease then subsisting, reserving a rent. Here they occur in an indenture between landlord and tenant, creating a new or enlarged interest, and there was no necessity for introducing words of qualification or condition into the *Habendum*; and I consider them rather in the nature of an informal *Reddendum* than as part of the *Habendum*. But, besides, it is conceded in that case that the words were of an

equivocal character, and that if such appeared to be the intention of the parties, they might constitute a covenant to pay the rent; and I confess it appears manifest to me that such was the intention of the parties in this case.

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This then, being an express covenant, entered into by the defendant with the plaintiff, to pay the rent during the renewed term, I feel no difficulty whatever in holding that the defendant's plea of assignment over, before the rent declared for became due, is bad; that therefore the demurrer to that plea was rightly allowed by the Court of Queen's Bench; and that therefore the judgment of that Court should be affirmed.

LEFROY, B.



I concur in the judgments delivered by my Brothers MOORE and JACKSON.

It is very material, when we come to construe an instrument of this sort, to see what are the reciprocal rights of the landlord and tenant. It is not necessary to enter into the consideration whether this deed conveyed an estate either by enlargement or by operating on the reversion, or whether it conveyed any legal estate at all; for if it did not convey a legal estate, if it be a covenant at all, it is a covenant in gross; and it is well settled that if a mortgagor assign his equity of redemption, the assignee cannot bring an action on the covenant. Taking this therefore not to convey a legal estate, these words, if they have any meaning, amount only to a covenant in gross, and consequently the assignment of the defendant cannot discharge him from the operation of this covenant.

The question then is, is there a covenant? Is there in this instrument an agreement by the landlord to give the tenant, and that the tenant should enjoy for two old lives and an additional life, a permanent interest? If these words, "subject to the rent and covenants," do not mean something to be done on the part of the tenant, why introduce them? (I am now treating them as an agreement.) What does the tenant mean by saying, in an instrument by which he agrees to accept an interest for three lives, and by which his landlord covenanted to give him an interest for three lives, that

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he will hold to him and his heirs that interest, subject to the rent and all the covenants on his the tenant's part to be done and performed? It would be very unintelligible to say that this deed, not passing a legal estate, but yet containing an agreement that the landlord should give an interest to the tenant, and that the tenant should hold subject to the rents and covenants, that that should not amount to an agreement on his the tenant's part, at the same moment that he derives the interest, that he should perform the other words of his agreement. But further, the tenant agrees to hold to him and his heirs, and yet he contends that his agreement is only to pay rent so long as he is assignee. It is admitted that if he covenant as tenant, he must be under a personal liability. How can he take an interest to him and his heirs if he assign over? Is the heir to take without payment of rent? I cannot see how that could be arrived at without a violation of the plain meaning of the words, by saying that when he agrees to take to him and his heirs, that that was a covenant on him personally only so long as he should remain assignee. Looking to the context of the deed, his agreeing to take an interest, we cannot separate the words, "subject to the rent and covenants," from that giving him the interest, and we cannot suffer a party to defeat his own contract by severing the parts of it. Suppose this but an equitable instrument containing an agreement, would it not sustain an action? How then could the assignment pass any interest, legal or equitable, which would deprive the landlord of his right to sue on this personal covenant, or covenant in gross? Further, could the landlord call on the tenant to name a life? Could he treat this as an instrument under which the tenant gets no benefit? The landlord is bound at law to nominate a new life under the Tenantry Act. The landlord is bound to give all that the tenant is entitled to get, and to preclude himself from any benefit arising from the dropping of the life. All the material substantial obligations of both parties are discharged by this deed, whether it pass or does not pass an estate. If it pass an estate, it would be monstrous to say it should pass a legal estate to the tenant, *quá* tenant, and yet to say he is not to pay rent.

But is there any thing preventing the words, "subject to the rent

and covenants," separately in themselves constituting a covenant? The case of *Wolveridge v. Stewart* has been referred to as making it impossible to construe these words as containing a covenant to pay the rent. That case is an authority that these words would naturally and properly amount to a covenant. The natural construction to be put on the words, "subject to the rent and covenants," was, that they were descriptive of the interest.

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I therefore am of opinion that the judgment of the Court of Queen's Bench stands on a solid foundation both in law and reason, and that all the niceties that have been gone into, whether this operated by enlargement or as a reversionary interest, and all the difficulties suggested as likely to result from this, are quite out of the case, and therefore that the judgment ought to be affirmed.

BALL, J.

I concur in the judgment of the majority of the Court. The case of the plaintiff in error involves two propositions, to neither of which can I accede. He insists, in the first place, that the renewal of 1818 operated not as the grant of an interest in the land, but only by way of enlargement of the estate before granted by the lease of 1792; and secondly, he contends that the renewal of 1818 contained no *express* covenant on his part for payment of the rent; and from these two propositions he calls on the Court to infer as a conclusion of law that the effect of his assignment to Roache, and the acceptance by the defendant in error of Roache as his tenant, was to discharge the plaintiff in error from the implied covenant to pay the rent contained in the renewal of 1818.

With respect to the first of these positions, besides the difficulty suggested at the Bar, as arising from *Lord Stafford's case*, of holding that where the two instruments are not between the same parties, the one can take effect as an enlargement of the estate created by the other, there is this further objection, that the interest granted by the lease of 1792 is to William Drought, his heirs and assigns, whereas the *Habendum* in the renewal of 1818 is to the plaintiff in error, *his* heirs and assigns, being a line of descent and devolution of the interest different from that created by the lease

H. T. 1852. of 1792. Accordingly, whatever may have been the effect of the
Exch. Cham. renewal of 1818, in respect of the estate granted by the original
 M'CREERY lease, no enlargement of that estate could, in my judgment, have
 v. been effected by the operation of terms applicable to another and
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Then, as to the second position. Whatever may have been the legal operation (if any) of the deed of 1818, in reference to the estate created by the lease of 1792, the former instrument contained, as I conceive, an *express* covenant, binding the plaintiff in error to the payment of the rent, which consequently was not discharged by the assignment to Roache, and the acceptance of him by the defendant in error as his tenant.

I consider therefore that the plaintiff in error has failed to establish either of the positions whereon he has rested his defence in this action, and that the judgment of the Court of Queen's Bench, in favour of the defendant in error, ought to be affirmed.

CRAMPTON, J.

Differing as I do from all my Brethren who have hitherto pronounced their opinions, and, as I have reason to believe, from those who are to follow me, I cannot but be distrustful of the conclusion at which I have arrived in this case; but that distrust is somewhat diminished when I find, that although all my Brethren arrive at the one termination, they do so by roads not only not the same, but directly opposed to each other.

The question for discussion, let me observe in the first place, is not whether the words of the deed of 1818 (so often referred to) might not amount to a covenant to pay the rent of £40 yearly, not merely while M'Creery continued to be the tenant, but to a personal covenant to pay that rent during the whole term? But the question is, whether it was the intention of the parties to change the relation in which they stood, and to bind the assignee (M'Creery) by a personal covenant in perpetuity? Did the parties agree or intend that M'Creery should be bound by such a covenant? On this question I retain the opinion which I expressed upon the argument in the Queen's Bench, and upon the ground upon which on that occasion

I rested that opinion ; and as my judgment in the Queen's Bench has been reported, and is now before the public, I shall not occupy time by repeating in detail the grounds upon which I felt myself unable to concur in the judgment of the Court below. But as the case has been presented to us in this Court in a light somewhat new, I think it right to make some observations in addition to those which I made below.

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In the Court below, the judgment was rested upon the ground that by the deed of 1818 a new estate was created in the defendant (below), and that the terms of the instrument imported an agreement to pay the reserved rent, which agreement, being under seal, amounted to a covenant. The necessary effect of this construction was, that the estate created by the original lease was merged, and the estate thereby created, and all its covenants, annihilated. The difficulties growing out of this view of the case were felt by the learned and able Counsel who replied in this Court for the plaintiff (below) ; and he put the case ultimately on the ground that, at all events, a new agreement between the landlord and the first assignee, then the tenant, was contained in the deed of 1818, and that it contained an express covenant on the tenant's part to pay the rent reserved by the original lease, *and that for the whole term in perpetuity.*

Now excluding the supposition that the deed of 1818 operated to enlarge the original estate (upon which I shall make an observation hereafter), it must, I think, be admitted on all sides that that deed *either* operated to create a new estate in the assignee, and to cause a surrender of the old estate, *or* that it operated only in the way of a covenant on the part of the defendant (below), binding him during the whole term to the payment of the rent reserved by the original lease. Out of this alternative the argument for the defendant in error cannot escape. Now I see, I must own, insuperable difficulties in the way of both these views.

First, as to the former view. First.—It manifestly contradicts the expressed intention of the parties, which (whether effected or not) was to *add to*, and not to take away any thing from, the subsisting interest, or take away any of the existing liabilities or

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securities. The old lease was to continue—the new instrument was to be *annexed* to the old, not to *supersede* it.

Secondly.—Upon this view of the case, the old estate being merged, and all its covenants thereby annulled, in what position do we find the landlord and tenant under the deed of 1818? The landlord has lost all the covenants of the original lease, he has *lost the security of the original lessee* for his rent, and the performance of the covenants in the original lease, and he has no more than a covenant from the assignee to pay the reserved rent. It seems to have been assumed, in support of this view, that a covenant for perpetual renewal implies a renewal by a *new lease*, and that in a suit for specific performance of such a covenant as that now before us, a Court of Equity must deem the renewal to be by way of a new lease. Now this assumption I must take leave to controvert in both its parts. The covenant in the present case affords a direct contradiction to it—it being a covenant to *add* and *insert* to the *time* and *term* thereby granted the life of such person as might be named, which nominated life was to be indorsed on the indenture, or written on a deed, label or parchment to be *affixed* to the indenture, *or* in a separate deed or writing declaring the life or lives failing, and the life or lives *so added in lieu thereof*—that is, that the renewal might be either by a separate deed or writing, or by indorsement or label to be affixed to the lease.

The terms of the covenant must decide the mode by which the renewal is to be effected; and if there be an option or alternative reserved by the covenant, as in this case there plainly is, the parties (or party) have a right to elect the mode of executing it; and a Court of Equity, whose province it is to compel the execution of such agreements, will not decree the execution of a new lease contrary to the intention of the parties. If in answer to a bill for specific performance of such a covenant as that in the deed of 1792, filed by an assignee, and seeking a renewal by a *new lease* to himself—if in such a case the lessor should say, I am not satisfied of your solvency, I will not relinquish the security of my own lessee, and therefore I will either execute a new lease to the original lessee, or, according to my covenant, I will add by label, deed or writing

a new life in lieu of the departed life: under these circumstances would any lawyer say that the assignee would be entitled to a renewal *by way of a new lease to himself*, or that a Court of Equity would or could make so unjust a decision? It would involve very serious consequences indeed; for thus a lessee for lives renewable for ever, who desired to get rid of his lease, might easily do so by assigning to a pauper, and getting the pauper assignee to compel a renewal to himself, and so deprive the landlord altogether of his rent. It follows therefore that in such a case as that now before us, we cannot assume that the assignee has a right to demand, or that the landlord is bound to grant, a renewal *by way of a new lease*; and *a fortiori*, if we find that the intention of the parties to the deed of 1818, as expressly declared by themselves, was, not to create a new estate, but to continue or enlarge the subsisting one, we should not so construe the deed as to contradict that intention, because we may think that the mode of renewal contemplated by the parties was less convenient or less reasonable than a renewal by a new lease would have been.

But, thirdly, the construction of the deed of 1818, which makes it create a new lease, with a covenant for payment of the rent, leaves the landlord without any covenant on the tenant's part, save that one for payment of the rent, and perhaps (pursuing the train of reasoning of the defendant's Counsel) a covenant on the tenant's part to perform the covenants in the lease. The case of *Nugent v. Sealy* (a) decided that a lease made under a power was bad for want of a covenant to pay the rent reserved, although the lessee took expressly, "subject to the yearly rent," &c., and *subject also to the covenants in a former lease mentioned*. I think it impossible (as was suggested at Bar) to consider the covenants in the lease of 1792 as incorporated into the deed of 1818. In equity they may be so understood, but at law so to hold would be to do violence both to language and the rule and practice of conveyancing. On the other hand, those words strongly import that the original covenants were to continue binding covenants, that it was intended that the old lease should continue operative.

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(a) Al. & Nap. 365.

11 T. 1272.
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Again, this construction leaves the tenant without a single covenant on the landlord's part. Equities there are growing out of such a transaction; but these would not avail in a Court of Law. So that the result is, that by this construction (and a forced construction it is), not only is the expressed intention of the parties defeated, but an estate is created, which involves liabilities and consequences injurious both to landlord and tenant.

I may add, that this construction is also contrary to that of the plaintiff in his own declaration; for he claims, not a rent reserved by the deed of 1818, but the rent reserved by the lease of 1792, as a still subsisting lease.

The new ground upon which the case for the defendant in error is rested is, that supposing the continued subsistence of the lease of 1792, the deed of 1818 contains a new express covenant on the assignee's part to pay the rent and perform the covenants contained in the lease. But this construction, I apprehend, is liable to difficulties at least as great as the former. First of all, no such intention is expressed by the parties; secondly, it supposes the continued liability of the original lessee upon his express covenant; it supposes the continued liability of the assignee to the original covenant *quæ assignee*, and it makes him also liable to a new express covenant under the terms of the deed of 1818, thus making the same person liable to the same party for the same rent by two different covenants—a covenant in law upon the original lease, and the assignment of it, and a new personal covenant by the deed of 1818. I do not say that the parties might not, if they so intended, place themselves in a position so novel and so anomalous; but I say that such an intention should appear clearly on the face of the instrument, and I can see nothing like it in the deed of 1818. We ought not, I think, to presume it.

But this is not all. This new covenant (if it is to be spelled out) is clearly on this view of the case a covenant in gross: it does not run with the estate and is not there transferable to a second assignee, so that a second assignment having taken place, and Roche being now the tenant of Lane, and created and dealt with by him as such, M'NALLY is left in the position of a party bound or indem-

nify Luttrell if the rent be not paid by Roache. Now the declaration is not framed to meet this view of the case ; it assumes M'Creery to be the tenant, and in the first instance liable to the rent, *although in point of fact and of law M'Creery is not the tenant of Luttrell at all*, but only collaterally liable for default of payment by the actual tenant, who may, for aught that appears, have been satisfied or been released by Luttrell as to the rent accrued due under the lease of 1792.

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I would add an observation on the subject of enlargement ; it is this:—For the purpose of this argument it is quite unimportant whether or not the renewal operated by way of enlargement, if it was the intention of the parties that the transaction should be of that character. It may be that an assignee cannot avail himself of such a condition as that upon which the enlargement was to be made ; and undoubtedly there is a resolution to that effect in *Lord Stafford's case* : at the same time, if the question should ever arise before the ultimate tribunal, there is much to be considered in the learned note upon this subject appended to the case of *Jack v. Reilly (a)*. But assuming that resolution to state the law upon this subject, we still have to recur to the intention of the parties ; and if that intention was, as I think it plainly was, to continue the old estate, and not to change the relation of the parties, to put any other construction upon the deed of 1818 will be, not to execute their agreement, but to make a new agreement for them.

If then I am asked to put a construction on the deed of 1818, looking to the state and relation of the parties to it, I should say, if the enlargement contemplated by the parties can legally take effect, that the words upon which the question arises, “to have “and to hold the said premises, subject to the said yearly rent and “covenants,” &c., are words descriptive of the enlarged estate, and of the *continued* liabilities of the tenant under the lease of 1792 ; but if by the strict rule of law the intended enlargement cannot legally take effect, then the old estate and its liabilities and covenants continuing, the deed of 1818 operates as a solemn acknowledgment under seal that the tenant has performed his duty in

(a) 2 H. & Br 307.

H. T. 1852. nominating the new life, and is entitled to the benefit of that nomi-
Exch. Cham. nation ; the enlargement must rest in equity a condition applicable,
 M'CREERY in nine cases out of ten, to estates of this description, so often the
 v. subject of family settlements, mortgages and incumbrances.
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My opinion is that the judgment should be reversed.

TORRENS, J.

In this case I am of opinion that the judgment of the Court of Queen's Bench should be affirmed.

There appears to me to be two questions for the consideration of this Court. First—Can the intention of the parties to the instrument bearing date the 21st of April 1818 be satisfactorily ascertained from the context of that instrument? And secondly—Have the parties by their sealed agreement carried out that intention by the legal construction of that agreement? In my judgment an affirmative answer is to be given to both propositions.

It is material to advert to the situation of the parties. At the time of entering into the agreement of the 21st of April 1818, the estate of the lessee William Drought, in the lease of 1792, is stated to be legally vested in the plaintiff in error in his plea upon oyer of the deed ; and in consequence thereof, as was his right (one of the lives having dropped), it is likewise stated that he made application to the defendant in error, in whom the reversion was vested, to execute a renewal of the lease, *eo nomine*, by the insertion of a new life. This proposal is acceded to, and the agreement in question is executed between the parties under their hands and seals, containing, in my judgment, an express covenant on the part of the plaintiff in error, not only for the payment of the reserved rent, by the words, "but subject thereto, and to all and singular the covenants and agreements in the indenture of lease of 1792, and which on the *tenant's* or lessee's part are to be performed." In my judgment, words cannot express a stronger adoption of the covenants of the original lease by writing under hand and seal, than the words here used ; and if it was the intention of the party only to render himself liable as long as he was the assignee of the original lessee, and if it was the intention of the plaintiff in error only to bind himself to the

payment of the rent and the performance of the covenants so long only as he was the assignee of the lessee's interest, why did he not, as Lord Denman says, in *Wolveridge v. Stewart*, so covenant in distinct and intelligible terms as to his future liability as such assignee, and not identify himself with the obligations to the original lessee? In the case of *Wilson v. Burrell* (a), Chief Justice Tyndal, in clear and unambiguous language, lays down what the law is in the construction of such agreements as the present; all his observations appear to me most pertinent to the elucidation of the intention of the parties in this case. He cites from *Com. Dig.*, tit. *Covenant*, this maxim:—"That any words in a deed which show an agreement to do a thing make a covenant." And he then proceeds to lay down the proper rules of construction for discovering what is the proper sense and meaning of the parties in the deed:—"In some cases," he says, "the meaning is more clearly expressed, and therefore more easily discovered; in others it is expressed with more obscurity, and discovered with greater difficulty. In some cases it is discovered from one single clause; in others it is only to be made out by the comparison of different and perhaps distant parts of the same instrument. But after the intention and meaning of the parties is once ascertained, after the agreement is once inferred from the words employed in the instrument, all difficulty which has been encountered in arriving at such meaning is to be entirely disregarded. The legal effect and operation of the covenant, whether framed in express terms, that is, whether it be an express covenant, or whether the covenant be matter of inference or agreement, is precisely the same; and an implied covenant, in the proper sense of the term, differs nothing in its operation or legal consequences from an express covenant."

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Now applying these principles to the present case, can any words be more declaratory of what obligations the party entering into this agreement bound himself than the words contained in the concluding paragraph of the deed of the 21st of April 1818? Those words are as follow:—"subject to the yearly rent of £40 sterling, and to all and singular the covenants and agreements in said indenture of

(a) 1 C. B. 430.

H. T. 1852. "lease contained, and which on the tenant's or lessee's part (not on
Arch. (L. Ham.
 "the part of the assignee) are or ought to be done, paid or performed."
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LUTTRELL. These words "subject to" have been made matter of much discussion,
 both in the case at Bar, and that of *Wolveridge v. Stewart*; in which
 latter case, under the circumstances, they were held to be words of
 qualification and not of contract; which no doubt, if it be apparent
 on the instrument that it was the intention of the parties so to use
 them, or if it be equivocal in what sense they have been used, may
 be so construed.

I am of opinion, for the foregoing reasons, that a plain inten-
 tion is deducible from the words of this instrument to render the
 plaintiff in error liable to the payment of this rent, and that an
 express covenant so to do is contained in the instrument. I should
 be quite satisfied to rest my judgment also on the reasons assigned by
 my LORD CHIEF JUSTICE, and his Brethren of the Court of Queen's
 Bench, with whom my opinion is in concurrence—namely, that the
 legal construction of the two instruments of 1792 and 1818 operate
 as a valid lease and re-lease; and though the word "grant" is not
 used, that a word or words tantamount are not indispensable, if, as
 Lord Kenyon lays down (a), it be manifest that the intention of the
 parties was to grant by deed.

Independent of the reasons assigned in the Court below for the
 judgment there pronounced, I am much disposed to think that the
 lease of 1792 and the renewal of 1818 should be read and construed
 as one instrument, at least so far as the preservation of the cove-
 nants, as suggested by my Brother BALL; and if I be right in that
 opinion, it puts both the intention of the parties and the legal con-
 struction of their acts beyond all doubt.

PERSEFARUS, R.

The question in this case is whether the words, "subject to the
 yearly rent and all singular the covenants and agreements," men-
 tioned in the instrument of 1818 amount to an express covenant or
 not? Whether they do or not, is to be collected from the instrument
 itself, and from the position in which the parties were placed.

Whether the instrument of 1818 operated as an enlargement of the estate, or whether it operated as a surrender, or whatever effect it may have had, it is unnecessary for me to say ; but this is clear, the estate and interest of the lessee, created by the deed of 1792, had become vested in M'Creery, and the interest of the lessor in Luttrell ; one was entitled to obtain, and the other to grant, a renewal : and being in that situation, they proceed, at the request of the tenant, to have that performed which the covenant for renewal entitled him to. That being the situation of the parties, what can we suppose the natural thing to be done ? The tenant was desirous of getting an enlargement, or at least the recognition of the landlord to his right to an extension of the term, and the landlord was anxious to have the personal covenant of M'Creery to secure the rent (and I would say that was the intention on the one side and on the other, and was independent of the consideration how the instrument was to operate). The intention was that the personal security of the tenant was to be given. If instead of using the words, "subject to the payment of the rent and all and singular the covenants and agreements," they had used the words "subject to, and the tenant hereby covenants to pay, the rent reserved in that lease," there would be no question that would remove the objection as to whether there was enlargement or not ; it would have meant a personal covenant by the lessee.

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It appears to me the case is not to be decided by supposing difficulties that may exist on the construction to be given to this instrument, but to see what the parties had agreed to have done. We find one party contracting to give an estate for the life of the Duke of Leinster, and the other agreeing to give his personal security for the payment of the rent. If he had done so by ambiguous words, there might be a difficulty, but he has done so by express words ; there therefore can be no question, and those difficulties do not appear to interfere with the construction of this instrument.

It is agreed on all hands that no form of words is necessary to constitute a covenant, and it is further agreed that the words used are sufficient to make an express covenant, if such be the intention of the parties. Is not this then the true meaning of the words, when we look to the estate of the parties ? One is tenant in possession,

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and the other, who is in reversion, is about to give an estate, whether by enlargement or otherwise is immaterial. Is it not the plain meaning to be intended that the tenant covenants to perform that which the estate called on him to perform? and is it an answer to that express covenant to say that he was liable only as assignee to a covenant running with the land? I do not apprehend M'Creery knew whether he should be liable to a covenant running with the land, and also an express covenant; but even so, I could see no great hardship in his subjecting himself to the double responsibility arising on both instruments. In *Wolveridge v. Stewart* the situation of the parties was different. There the man was not contracting with the landlord, but the tenant was about to part with his estate. The words there merely denoted the quantity of the estate which the landlord gave, and the Judge held that the words "subject to" did contain an express covenant. The words here are much stronger, it being between the reversioner and the tenant. It therefore appears to me that the words in this deed are to receive the same construction put upon them as in the case of *Wolveridge v. Stewart*, in which the Judges all agreed.

I therefore agree in opinion with the majority of the Judges that the judgment of the Court below ought to be affirmed.

PILLOT, C. B.

In my opinion this deed did not operate by way of enlargement. If it did not operate by way of enlargement, then the question is whether it operates as a new lease for three lives? If it operate as such, the necessary effect must be to destroy the estate, and the liability under the covenants created by the original lease; and if that would be the operation, it would appear to me utterly inconsistent with the relation between the parties. I hold that the expression indicated nothing less than an express covenant, for otherwise the instrument would amount to nothing less than a grant without implying any liability whatever on the tenant's part: for if these words do not operate as a covenant, it is plain, whatever be the effect of the instrument, with respect to the rent there is no liability whatever. If the instrument had not an

operation to enlarge the estate, if it was not a demise for three lives, it must operate as a grant of the reversion for an additional life; and if so, it must have the effect of uniting the estate for the additional life with the former, and operate as a merger, which would amount to a destruction of the original reversion. If that be so, when parties introduce these express terms, how can it be held that there was no intention to bind the parties to this covenant? If the intention was to bind the parties, that intention cannot be effected against the law by retaining the original reversion, and the liability on the old covenants; but by importing an express covenant to pay the rent. It therefore appears to me, if this instrument does not operate by enlargement, you must give it this construction, that it was an express covenant to pay the rent during the existence of the estate.

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But still the question arises whether or not it contains an express covenant. Assuming the enlargement may be effected by the execution of a renewal, and assuming the instrument operated by way of enlargement, still the question arises, involving very considerable doubts, namely, what is the import of the expression of the parties? It is plain that we are to construe it not merely with reference to the terms but with reference to the relation between the parties. The case of *Wolveridge v. Stewart* is an authority for holding these words are capable of two constructions. With respect to the other parts of the instrument, I am not influenced by the consideration that the contract is to hold to the lessee, his heirs and assigns; because the original contract contemplates an assignment, and renewal to the assignee, for the purpose of conferring on the assignee all the benefits incident to a renewal, and when granted, it must operate for the benefit of the party receiving the renewal. Again, when the contract is to renew to the assignee and to the heir, it contemplates that the assignee will pass the estate with the assignment, and confer a new estate transmissible to his heirs and assigns. But when I look to the situation in which the parties stood, and consider the effect of such a transaction as a renewal, and consider it in reference to the relation of the parties, I cannot withhold from consideration the vast inconvenience which must

H. T. 1852. exist if a renewal were granted creating new liabilities for the
Exch. Cham. benefit of the landlord. Without going further, it is sufficient to
 M'CREERY say it was reasonable between the lessor and lessee; for the lessor
 v. says, I will not grant a renewal unless you enter into an express
 LUTTRELL. contract to pay the rent.

It is sufficient to say that there is a contract under seal, by which one party says, I will give you a renewal if you undertake the liability to pay the rent; and the other party says, I will take the renewal under that liability.

I therefore am of opinion the judgment should be affirmed.

MONAHAN, C. J.

I concur in the opinion of the majority of the Court, that the judgment of the Court of Queen's Bench was right.

The declaration states that Lord Carhampton re-leased the premises to William Drought, *Habendum* for three lives, with a covenant for perpetual renewal; that William Drought did thereby, for himself, his heirs, executors and assigns, covenant to pay the rent to Lord Carhampton, and that Lord Carhampton did, for himself, his heirs, executors, administrators and assigns, covenant to renew. There the landlord covenants not merely with the tenant and his heirs, but also with his assigns, from time to time, to renew.

It has been argued that, under such a covenant, it would be competent for the landlord to refuse to execute a renewal to an assignee whose solvency he did not approve of, particularly if the effect thereof would be to discharge the liability of the original tenant. I do not think a Court of Equity would listen to such an argument. I conceive if a landlord enter into a covenant with a tenant and his assigns, the assignee is entitled to the benefit of the covenant, unless where the tenant, in a case of fraud, assigns over to a pauper to cheat his landlord. When therefore this lease was granted in 1792, containing a covenant for renewal with the assignee, and when the tenant did assign his interest, it was the right of such assignee to obtain a renewal; and if a legal renewal could not be made by way of enlargement, or without destruction of the covenant in the original lease, still, in my opinion, it was the duty of the landlord to execute

such a renewal, even though it should have had that effect. Accordingly some of the lives having dropped, and the estate of the tenant having vested in the plaintiff, he applied for a renewal, which, in my opinion, the landlord was bound to execute. The declaration describes the legal effect of the covenant, although not in words; and the question comes to this—is that declaration right when it says that the party expressly covenanted to pay the rent?

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That leads to the construction of the deed of 1818, which was set forth onoyer; and the question is, was the pleader right in saying that it contains an express covenant to pay the rent?—for if it does contain an express covenant, the plea is no answer to such a declaration. That deed recites the lease of 1792; that the estate of the Earl of Carhampton was vested in Henry Luttrell, and the estate of William Drought in Thomas M'Creery; that one of the lives was dead; and that Thomas M'Creery had applied to Henry Luttrell to execute a renewal by inserting a life in lieu thereof, to which Henry Luttrell had agreed.

Upon every principle of law we are bound to look to the recitals, to see what construction is to be put upon the operative words. The clear intention of the parties was that the tenant should have the legal estate, not only for the surviving lives, but for the new lives to be added. Therefore if any construction will operate to vest the legal estate in the tenant, it is the duty of the Court to give it that construction.

The indenture then witnesses, that in pursuance of the covenant for renewal, Henry Luttrell added and inserted, and by these presents doth add and insert to the time and term of said lease, the life of the Duke of Leinster; to have and to hold the said premises unto Thomas M'Creery, his heirs and assigns, for and during the natural life and lives of the *cestui que vies*, and the survivor of them, and every other such person or persons as shall from time to time be added thereto, in pursuance of such covenant.

Now, no matter whether the legal effect of that be to destroy the old covenant in the original lease, it is plain there was an intention that the party should have a legal subsisting interest for three lives.

Then follow the words, "subject to the said yearly rent of £40

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"sterling, and to all and singular the covenants and agreements in
"said indenture of lease contained, and which on the tenant or
"lessee's part are or ought to be paid, done, or performed."

The tenant agrees to hold these premises, not only subject to the rent, but to all and singular the covenants and agreements in the original lease. It appears plain on this document the intention was that every covenant contained in the old lease, whether running with the land or not, or with the assignee or not, should be binding on the new tenant. There are words which show an intention to throw a personal obligation on the new tenant to perform all the covenants contained in the original lease, which the tenant is bound to perform.

I therefore think that we have nothing to do with the words "yielding and paying," whether they mean an express covenant or not. The true construction to be put on this document is, that the party agrees to perform all the covenants contained in the lease of 1792, and that all are to be imported into the deed of 1818; and although it is not usual to have a covenant entered into by reference, still there are instances of covenants being executed in that form. But even if this were to operate by enlargement, there is no reason why it should not be considered as an additional covenant on the part of the new tenant, which is not unusual where premises are assigned with the assent of the landlord.

The CHIEF JUSTICE is unable to attend; but he has authorised me to say he is of opinion that the judgment of the Court of Queen's Bench was right.

Judgment affirmed.

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Exchequer.

ORME and MOSTYN,
 Executor and Executrix of FFOLLIOTT T. MOSTYN, deceased,
 v.
 EDWARD DUFFY.

(*Exchequer.*)

Feb. 26, 27.

THIS was an action of assumpsit, brought by the executor and the executrix of the payee of a promissory note for £500, dated the 1st July 1844, against the maker, tried at the Sittings after last Trinity Term, before the LORD CHIEF BARON. The declaration contained a count upon the note, a count for work and labour, and the ordinary money counts. The defendant pleaded the general issue.

The execution of the promissory note by the defendant having been established by consent, the plaintiffs closed their case.

The defendant then made the following case:—That one Captain Joyce having made his will in the year 1838, and appointed the defendant one of the executors and trustees thereof, Mr. John Collum, who had been solicitor of Captain Joyce, and was the solicitor of the principal legatee in his will (then a minor), instructed the late Mr. Mostyn to apply for grant of probate to the defendant. A caveat was entered, and a suit impeaching the will ensued. On the 2nd of May 1840, a decree in that suit was pronounced, setting aside the will on technical grounds, but the defendant was thereby decreed to be paid his costs of said suit between party and party out of the assets of said deceased. That the assets consisted, *inter alia*, of three mortgages, amounting in the whole, for principal, to the

Assumpsit, on a promissory note. Plea—general issue. The defence at the trial was—first, that certain costs due to the defendant were by deed assigned by him to the plaintiff as a security for the debt, and thereby on the face of the deed, although there were no express words to that effect, the right of action was suspended by operation of law until the security given by the deed had failed. Secondly, that prior to the execution of the deed, and on the faith of which it was executed, a parol agreement was entered into

that all proceedings on foot of the promissory note should be suspended until the security given by the deed had failed.

Held, First—that the right of action was not suspended by operation of law.

Secondly—That, assuming the parol agreement to be admissible in evidence, it would not suspend the right of action.

H. T. 1852. sum of £2230. 10s. 0d. upon the estates of a Captain Galbraith,
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 DUFFY. so soon as letters of administration were obtained. A bill was filed in Chancery to foreclose these mortgages, and a final decree for a sale of the mortgaged lands having been pronounced on the 13th of August 1850, a petition was presented in the Incumbered Estates Court for a sale of the said lands. The mortgages appeared to be the first charge on the estate.

In 1841, Mostyn furnished to the defendant his bill of costs between proctor and client, amounting to £544. 6s. 3d, and afterwards procured an *ex parte* taxation of them, and in 1844 having become pressing for payment, the defendant passed to Mostyn the promissory note, the subject matter of the present action.

On the 15th of December 1845, the sum of £120 Government £3½ per cent. stock, which produced £113. 8s. 8d., was transferred to Mostyn as part payment on foot of the note. In May 1846, the defendant was served with a writ of *capias ad respondendum* by Mostyn for the balance then due on foot of the note; and an appearance having been entered, and instructions for the declaration being in a state of preparation, a compromise of the suit was verbally proposed by the defendant, and agreed to by Mostyn. The agreement then entered into was, that Mostyn should proceed to tax the defendant's costs between party and party in the Prerogative Court; and that when they were taxed, the defendant should assign them to Mostyn, who agreed to accept of such assignment of the said costs for whatever they should amount to on taxation, in part satisfaction of the sum then due on foot of the note, and to suspend all proceedings on foot of the note until said Galbraith's estate should be sold; and that Mostyn should only resort to the note in the event of the assets not being sufficient to pay the amount of said costs; and the defendant was to pay Mostyn the balance between the amount of the costs, when taxed and ascertained, and the amount due on the promissory note.

It appeared that after giving the defendant all proper credits, there remained due on foot of the promissory note £402. 6s. 2d., and that the costs were taxed and certified to the sum of £380. 8s. 3d. Thereupon a deed of assignment, bearing date the 7th of May 1847,

was made between the defendant of one part, and the said Mostyn of the other part, wherein, after reciting part of the proceedings in the Prerogative Court before mentioned, the said proceedings in relation to the estate of Captain Galbraith, the bill passed to Mostyn for his costs, and that Mostyn was pressing for payment of his demand, it was recited as follows, that “the said Edward Duffy, the defendant, “hath proposed to assign to the said Ffolliott Thornton Mostyn the “said charge of £380. 8s. 3d. so decreed to him by the decree or “order of the said Court of Prerogative, as hereinbefore mentioned, “as security for the part payment of his said demand, and the said “Ffolliott Thornton Mostyn hath agreed to accept the same.” And the said deed witnessed that “the said Edward Duffy, in pursuance “of said agreement, and in consideration of the said sum so due “and owing by him to the said Ffolliott Thornton Mostyn, and in “order to secure the payment of same, and also in consideration of “the sum of ten shillings to him paid, hath granted,” &c. The deed then assigned to the said Mostyn the said costs awarded as aforesaid to the defendant, and contained a power of attorney to Mostyn to receive them. The defendant, after the execution of the deed, paid to Mostyn the difference in amount between the note and taxed costs as agreed upon. Mr. Collum, in whose office the deed was prepared, was examined, and stated in his evidence that the deed was executed on the terms of the agreement verbally entered into in May 1846, viz., that all proceedings on the note should be suspended until the sale of the Galbraith estate took place, and the assets of Joyce realised, and that no proceedings should be taken except in the event of the assets proving insufficient to pay the amount remaining due on the note, viz., £380. 8s. 3d.

It also appeared that Mostyn had filed and proved a charge in the Master's office, for the sum so assigned to him, and that it had been reported to him. Since his death, his executors filed a claim on foot of the same sum in the Incumbered Estates Court; it was the only charge appearing on the assets of Captain Joyce, and it was evident that they were fully adequate to meet it. The defendant having closed—

The LORD CHIEF BARON took the case from the jury, and directed

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them to find a verdict for the plaintiff, but gave leave to the defendant to move to have said verdict turned into a verdict for the defendant, upon the following grounds—Firstly, if on the face of the deed the action was suspended. Secondly, if he ought to have left to the jury the contract proved by the defendant's witnesses. The jury accordingly found a verdict for the plaintiff, for £404. 6s. 9d., including interest to the 3rd of November then next. On the motion of the defendant, an order bearing date the 6th of November 1851 was made by the Court:—"That the verdict had for the plaintiff be set aside, and instead thereof, a verdict be entered for the defendant, pursuant to the leave reserved by the learned Judge "at the trial, unless cause be shown to the contrary," &c.

Gayer, with *Doherty* and *S. Ferguson*, now showed cause against the conditional order.

With respect to the first question, viz., the effect of the deed. There is not one word in the deed itself about the plaintiff suspending his proceedings; that he should do so, is not stated, as it should have been if it had been so intended, as the consideration or part of the consideration for the assignment; on the contrary, the consideration stated in the deed is the sum due to the plaintiff, and to secure the payment of that sum. There is nothing either expressed or implied in the recitals of any agreement for a suspension; the recital in reference to the arrangement is simply that the assignment was proposed "as security for *part* payment of his (the plaintiff's) said demand." Now from that it would appear that it was intended to give an additional or collateral security—not to suspend the remedy on the old one, or to substitute a new security; but at all events, the legal inference to be drawn from the acceptance of a new security, in the absence of express words, is that it is accepted simply as a collateral security. In *Emes and another v. Widdowson* (a), it was held, that an assignment of property to secure the payment of debts, with a power of sale, was only a collateral security, and that the right of action was not suspended, there being no special stipulation to that effect contained in the

(a) 4 Car. & P. 151.

deed of assignment.—[LEFROY, B. If the effect of the deed was to suspend the right to sue, the right to sue would be extinguished altogether, which it is not even alleged was the intention of the parties.]—That principle is laid down in *Platt v. The Sheriffs of London* (a); there it is said:—“And if a personal thing is once in “suspense, or the person of a man once discharged for a personal “thing, it is a discharge for ever.” And in *Woodward v. Lord D’Arcy* (b):—“For a personal action once in suspense by the act of the party entitled to it is always extinguished.” In *Cheetham and others, executors, v. Ward* (c), the obligee in a joint and several bond had made one of two obligors his executor with others, and it was held that the action on the bond was discharged as to both obligors. Rooke, J., says:—“The general principle “that if the action be once suspended in the case of a single ob- “ligor, it is gone for ever, is not now disputed.” And Eyre, C. J., treated it in his judgment as an acknowledged principle that “a personal action once suspended by the voluntary act of the party entitled to it, is for ever gone and discharged.” With respect to the second question reserved, parol evidence is not admissible to add to the terms of the contract. In *Lord Portmore v. Morris* (d), parol evidence, that it was part of the agreement for an annuity that it should be redeemable, although not part of the contract in writing, was held to be inadmissible. In *Haynes v. Hare* (e), Lord Loughborough, in delivering the judgment of the Court, said:—“It is not necessary to cite any “case to prove the proposition that parol evidence of a parol com- “munication between the parties ought not to be received, to add “a term not inserted in the specific agreement which they have “executed; and for this plain reason, that what passed between “them in that communication may have been altered and shifted in “a variety of ways, but what they have signed and sealed was finally “settled. It would destroy all trust, it would destroy all security and “lay it open, unless the parties are completely bound by what they

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(a) 1 Plow. 36; see cases there referred to in support of the proposition.

(b) Ib. 184, a.

(c) 1 Bos. & Pul. 631, 634.

(d) 2 Brown, C. C. 219.

(e) 1 H. Black. 659.

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“have signed and sealed.” There must be either the admission of the party or something tantamount, to induce a Court to add a term to the contract: *Haynes v. Hare* (a). Parol evidence of conversations before, and even at the time of the written agreement being signed, is not admissible: *Rich v. Jackson* (b). The Lord Chancellor there said—“I cannot find that the Court has ever taken upon itself to add to the form of the agreement; that in repeated instances the Court has refused to do so, though it has been insisted that the parol evidence of the adverse party has shown the written agreement to be against conscience:” *Croome v. Le-diard* (c). In that case a deed contained two agreements; and on a bill filed for specific performance of one of them, evidence *aliunde* was held not to be admissible, to show that the two agreements were dependent on each other. Where a deed is impeached as fraudulent, on the ground that there is not any consideration, or merely the consideration of natural love and affection, parol evidence may perhaps be given to repel the presumption of fraud: *Gale v. Williamson* (d). But that is only to rebut the presumption of fraud that arises on the face of the instrument, and is an exceptional case.

Brooke (with *J. M'Mahon*), contra.

That the right of suit was suspended by the operation of the deed: *Simon v. Lloyd* (e). There an action was brought for goods sold, &c., and the defendant pleaded that he had accepted a bill without a drawer's name signed to it, and thereby undertook to pay to such person as should be the drawer, or order, two months after date, a sum of money in satisfaction of plaintiff's demand, and delivered the same to the plaintiff. The plaintiff replied that the bill remained in his hands without a drawer's name, unnegotiated and unpaid; and it was held, on demurrer, that the plaintiff's right to sue for the original debt was suspended during the two months, and until the instrument became due and unpaid. It is matter of every day's experience that persons suspend their right to sue by

(a) *Supra*.

(b) 4 Br. Ch. Ca. 514.

(c) 2 M. & K. 251; S. C. 6 Ves. 334, n. 37.

(d) 8 M. & W. 405.

(e) 2 Cr. M. & R. 187.

receiving bills of exchange, and still the right to sue for the original debt is not extinguished.—[PIGOT, C. B. The law with respect to bills of exchange is quite exceptional; and so it is stated to be in *Ford v. Beech* (a), in which case it was also decided that even an *express* agreement to suspend for a limited period a right of action on a contract would not be a bar to an action on that contract, but the subject of a cross action.]—The question in that case arose on the pleadings; here on the evidence: *Good v. Cheesman* (b). There a debtor being unable to meet the demands of his creditors, they signed an agreement, which was assented to by the debtor, to accept payment by his covenanting to pay to a trustee of their nomination one-third of his annual income, and executing a warrant of attorney as a collateral security until payment thereof. The creditors never nominated a trustee, and the agreement was not acted upon, and one of the creditors brought an action against the debtor for his demand. The debtor was always willing to perform his part of the agreement. It was held that the agreement was a good defence on the general issue.—[PENNEFATHER, B. There it was held that there was a new agreement substituted for the original contract.]—That is the case here also.—[PENNEFATHER, B. I think not. In that case it was held “that the consideration to “each creditor was the engagement of the others not to press their “individual claims.” That principle, though applicable to composition deeds between a debtor and his creditors, does not apply to a transaction like the present.]—Still that case shows that the right of action may be suspended for a limited period without being extinguished.

Doherty replied.

PIGOT, C. B.

It is with very great reluctance we decide that the verdict in this case must stand; but the rule of law relied on by the plaintiff, harsh as its operation may be in the present case, seems to be clearly in his favour. The deed of 1847 has been relied on by both parties, by the plaintiff as excluding the evidence offered by the defendant

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(a) 5 Dow. & Low. 610.

(b) 2 B. & Ad. 328.

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of a parol agreement to suspend the right of action for a certain period; and by the defendant as operating on the face of it as a suspension of the right of action until the Joyce estate should be wound up, when if the assets should prove insufficient to pay the costs assigned to Mostyn, he should be at liberty to proceed on the promissory note. From the view of the case taken by the Court, it becomes unnecessary to decide the question raised by the plaintiff; for assuming that such a parol agreement did exist as that contended for by the defendant, and was admissible in evidence, the decision of the Court must still be in favour of the plaintiff. The deed merely states the suit in the Ecclesiastical Court, and the agreement that certain costs which had been awarded to the defendant in that suit should be assigned to the plaintiff as a security for his demand. Now it is impossible to contend on the deed itself that the intention of the parties to that deed was to extinguish altogether the right of action on the promissory note; was its legal effect then to suspend the right? I think **BARON LEFROY** has answered that question when he stated that "if a right of action be suspended for any time it is altogether extinguished." But assuming the parol agreement to be admissible in evidence, it expressly suspends the right of action for a certain period, and after that period as expressly reserves the right; it could not therefore be contended that there was any intention to extinguish the right of action. Now what is the legal effect of such a state of things? The case of *Ford v. Beech* (a) seems to be exactly in point; in that case there was an express agreement "that the rights and causes of action of the plaintiff upon and in respect of the said two several notes (the subject matter of the action) should be suspended," until a certain event should happen; and it was held on writ of error, after verdict for the defendant, that *non obstante veredicto* judgment ought to have been given for the plaintiff; and **Wilde, C. J.**, in delivering the judgment of the Court said:—"In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied, viz., that it ought to receive that construction which

(a) *Supra*.

“its language will admit, and which will best effectuate the inten-
 “tion of the parties, to be collected from the whole of the agreement;
 “and that greater regard is to be had to the clear intent of the
 “parties than to any particular word which they may have used
 “in the expression of their intent: and applying that rule, the
 “question is, what sense and meaning must be given to the word
 “‘suspended’ used by the parties? It is quite clear that it was
 “not the intention of the parties that the agreement should have
 “the effect, from the moment of its being signed, of utterly and
 “for ever and in all events extinguishing the plaintiff’s claim and
 “demand upon the notes, or, in other words, that it should operate
 “as a release of the money due upon them. This is plain from the
 “words which impart that the plaintiff might sue upon the notes,
 “when A B should cease to make the quarterly payments men-
 “tioned in the agreement.” Those observations are precisely
 applicable to the present case; for the very terms of the parol
 agreement expressly show that it was not the intention of the
 parties to extinguish altogether the right of action on the promissory
 note; but what would be the effect of a temporary suspension of
 the right. Again, I adopt the words of the learned Chief Justice,
 who said:—“It is a very old and well established principle of law,
 “that the right to bring a personal action once existing, and by the
 “act of the party suspended for ever so short a time, is extinguished
 “and discharged and can never revive.” To hold therefore that
 this agreement operated as a legal suspension of the plaintiff’s right
 to sue would be to hold contrary to the manifest intention of the
 parties, that it operated as a complete discharge or release of the
 plaintiff’s right of suit. Parties are not however without a remedy
 in such a case, for it is quite settled that when such an agreement
 exists as that in *Ford v. Beech*, it can be taken advantage of in
 a cross action. In that same case of *Ford v. Beech*, the Chief
 Justice observed upon that point that “applying the rules of
 “construction before referred to, to the present case, and in order
 “best to effectuate the intention of the parties, it is necessary to
 “construe the agreement to mean that the plaintiff agreed to for-
 “bear his suit until the quarterly payment should cease to be made,

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 “suspend his right of action in the meantime, but to subject him to
 “an action for damages in the event of his suing contrary to his
 “agreement.” And I will not say that if by this action it should
 appear that the plaintiff has harrassed and oppressed the defendant,
 acted in contempt of good faith and justice, that the defendant may
 not be entitled to recover the entire amount of the loss he has sus-
 tained thereby.

PENNEFATHER, B.

It is unnecessary for the Court to decide upon the question that
 has been raised as to the admissibility of the parol evidence that was
 tendered on behalf of the defendant in this case; for assuming it
 to be admissible, it does not benefit the defendant. He says there
 was a parol agreement between the parties that proceedings should
 be suspended for a certain time, and that on the faith of that agree-
 ment the deed assigning the costs was executed. Now assuming
 that that agreement was admissible in evidence, it is clear that
 according to the law as laid down in the old authorities as well as
 in the most recent, such an agreement could not be pleaded in bar.
 An agreement not to sue at all is a release, and may be pleaded
 in bar. An agreement not to sue for a limited time cannot be
 pleaded in bar, but may be the subject of a cross action. And so
 the law is laid down by Lord Chief Justice Wilde, in the case of
Ford v. Beech, that has already been so fully referred to by the
 LORD CHIEF BARON; in his judgment he says:—“The only case
 “in which a covenant or promise not to sue is held to be pleadable
 “as a bar, or to operate as a suspension, and by consequence a
 “release or extinguishment of the right of action, is where the co-
 “venant or promise not to sue is general, not to sue at any time,
 “in such cases in order to avoid circuitry of action, the covenant
 “may be pleaded in bar as a release.” There has been however a
 good deal of stress laid in the argument on those cases where sus-
 pension existed without extinguishment—I allude to cases upon bills
 of exchange and promissory notes; but throughout I deemed those
 cases to be exceptional, and founded on the exigencies of mercantile

law : and I am happy to find that opinion fully borne out by the judgment of the Chief Justice Wilde. In that case, already so frequently referred to, he stated:—"Neither is the decision in this case "inconsistent with the several cases in which it has been held that "a party accepting a negotiable security payable in future, for or "on account of an antecedent demand, cannot until after such "negotiable security has become due and been dishonoured sue for "such antecedent demand; because independently of the considera- "tion of how far the acceptance of such negotiable security may "be deemed payment for the time, all such decisions seem to be "grounded upon the peculiar nature of the negotiable instrument, "and are deemed to be necessary exceptions to the general rules "of law in favour of the Law Merchant." For these reasons I concur in the judgment of the Court that the verdict must stand.

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LEFROY, B.

This is certainly a most inequitable action. There is no pretence that the plaintiff has not obtained a good security for his demand by the assignment of these costs; and it is quite clear from the evidence brought forward at the trial (but upon the admissibility of which it is unnecessary to express any opinion), that the understanding was that the plaintiff should suspend proceedings on getting that assignment; still the plaintiff's right to proceed seems incontrovertible. An agreement not to sue unless it amounts to a complete release cannot be pleaded in bar in an action; to hold that an agreement not to sue for a limited period amounted to a temporary suspension would be to give it effect as a complete release, as it is the established rule of law that a right of action once suspended is for ever extinguished; but that would be obviously in direct opposition to the intention of the parties. Such an agreement, therefore, to be made available at all, must be made the subject of a cross action. The case in the Court of Error, *Ford v. Beech*, seems to me most fully to support the old decisions on the subject: and that being so, I should be sorry to do any thing so inconvenient or unsafe as to disturb the old legal land-marks. I therefore entirely concur in the judgment of the Court.

Per Curiam—Allow the cause shown, but without costs.

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THE QUEEN, at the suit of WILLIAM LONG,

v.

MICHAEL STAUNTON.

Jan. 29.

Judgment had been recovered in an action for libel against R. B., as the "publisher and printer" of a certain newspaper. The plaintiff in that action moved, pursuant to 11 G. 4, and 1 W. 4, c. 73, s. 3, to put the recognizance of M. S., one of the sureties for R. B., in suit. The affidavit on which the motion was grounded described R. B. only as "printer and publisher." Held, that it should have appeared by the affidavit that R. B. was "editor, proprietor or conductor" of the said newspaper.

Held also, that the costs of the motion will not be allowed to a successful party who has filed affidavits unnecessary for the purpose of raising the point of law on which alone he has succeeded.

IN this case a conditional order had been obtained on the 16th of January 1852, to put the defendant's recognizance in suit, and was in the terms following:—"Upon motion of Mr. *West*, of Counsel "for plaintiff, and on reading the recognizance entered into and "acknowledged on the 4th of December 1831, by Richard Barrett, " 'as printer and publisher' of the *Pilot* newspaper, John Keshan, "since deceased, and Michael Staunton, and an affidavit; it is "ordered by the Court that the said William Long be at liberty "to put the said recognizance in suit against said Michael Staunton, "unless cause be shown to the contrary in six days after service "of this rule on the said Michael Staunton." The affidavit referred to in the above order was that of the said William Long; and from it the following facts appeared:—That on the 4th of December 1837, Richard Barrett, as printer and publisher of the *Pilot* newspaper, together with John Keshan and Michael Staunton, entered into a recognizance before BARON PENNEFATHER unto her Majesty the Queen; said Richard Barrett in the sum of £400, and said John Keshan and Michael Staunton in one other sum of £400, to be levied off them respectively, and their respective goods and chattels, lands and tenements, if they should fail in the condition therein. The condition therein was, that if the said Richard Barrett, his heirs, executors, administrators or assigns, should and would from time to time, and at all times, well and truly pay to the person or persons entitled the amount of all such damages or costs as should or might be recovered or awarded from or against any person or persons in any action or actions for any libel or libels published in the said newspaper, or in any newspaper which he should print or

publish, or cause to be printed or published, then said recognizance to be void, *otherwise* to remain in full force and virtue in law. That in Hilary Term 1845, the said William Long, in an action for libel brought by him in the Court of Common Pleas against Richard Barrett, as “printer and publisher” of the said *Pilot* newspaper, obtained a verdict against the said Richard Barrett for the sum of £150 and costs; and that to the said verdict, and the rulings of the learned Judge who tried said action, a bill of exceptions was taken by the said Richard Barrett, on argument of which judgment was given for the said William Long. That subsequently the said Richard Barrett issued forth a writ of error to the Exchequer Chamber; on which occasion said Richard Barrett, Michael Staunton and John Gray, Esqrs., entered into a recognizance in the sum of £530, conditioned that if the said Richard Barrett did not prosecute the said writ with effect, and if the said record process and giving of judgment should be affirmed against the said Richard Barrett, that said Richard Barrett should satisfy and pay unto said William Long all damages, expenses and costs to be awarded by or under the judgment, or suit, writ of error, or any future writ that might be afterwards brought in the said cause, returnable into Parliament, said recognizance to be void and of none effect, otherwise to remain in full force and virtue in law. That the Exchequer Chamber affirmed the said judgment of the Court of Common Pleas, with costs; and that thereupon the said Richard Barrett sued out a writ of error in said suit to Parliament, which was heard in the House of Lords in the month of June 1851, when the judgment of the Court below was affirmed with costs. That the judgment of the Lords was returned to Ireland with the records of the proceedings, and a judgment was made up thereon in the said Court of Common Pleas for the sum of £568. 8s. 7d., consisting of the following items:—Damages and taxed costs of action and bill of exceptions, £261. 2s. 0d.; taxed costs of said writ of error in Exchequer Chamber, £33. 13s. 11d.; and taxed costs of proceedings in the House of Lords, £271. 12s. 8d.

That the said William Long brought actions against Michael Staunton and John Gray on their said recognizance, and was paid

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H. T. 1852. the sum of £530. That there was still due to the said William Long,
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 THE QUEEN on foot of the said judgment of the Common Pleas so founded on
 v. the judgment of the House of Lords, the sum of £36. 8s. 7d. That
 STAUNTON. the said William Long, on the 4th of December 1851, caused to
 be issued forth of the said Court of Common Pleas a writ of *fieri facias* to the Sheriff of the county of Dublin, where the said Richard Barrett resided, against the goods and chattels of the said Richard Barrett, for the said sum of £36. 8s. 7d.; on which said writ the Sheriff made a return of "no goods." That John Keshan, one of the obligors in the said recognizance for £400, had lately died, and that said William Long had caused an application to be made to the defendant Michael Staunton, the other obligor therein, for payment of the said sum of £36. 8s. 7d., but that the said defendant had refused to pay the same.

The defendant filed an affidavit as cause against the said conditional order being made absolute; and therein, after admitting the several matters alleged of the said William Long, he stated that actions having been brought by the said William Long against him and John Gray on foot of the recognizance for £530, he paid to the attorney of said William Long the full amount of the said recognizance, and £16. 3s. for the costs of the proceedings thereon; and he alleged that having entered into the said recognizance for the sum of £530, conditioned to satisfy and pay all the damages, expenses and costs which might be awarded against the said Richard Barrett under the judgments in the aforesaid writs of error, and having now paid the aforesaid sum of £530, the full amount of the said recognizance, he submitted that he was not liable to pay any further or other sum as and for any damages, expenses or costs which had been awarded against the said Richard Barrett under the judgments on the said writ of error, inasmuch as the said recognizance for £530 was entered into by the defendant, and the other persons before mentioned, in order to cover all such damages, expenses and costs. And the defendant then submitted "that said
 "recognizance for £530 is to be considered as superseding the
 "recognizance entered into by the defendant and the other herein-
 "before mentioned person on the 4th of December 1837, by which

“ this defendant was liable for the sum of £400 ; and that such new H. T. 1852.
 “ recognizance for £530 included the aforesaid sum of £400, and Exchequer.
 “ the additional sum of £130 to cover the additional expenses likely THE QUEEN
 “ to be incurred in the proceedings on foot of the said writs of v.
 “ error.” STAUNTON.

J. D. Fitzgerald (with Sir *C. O’Loghlen*) now showed cause.

Independently of the question raised by the defendant’s affidavit, this conditional order must be discharged, on the ground that statutes regulating such proceedings have not been complied with. 11 *G.* 4, and 1 *W.* 4, c. 73, s. 3, enacts, “ That if any plaintiff in any action “ for libel against any ‘ editor, conductor or proprietor ’ of such “ newspaper, pamphlet or other paper as aforesaid, shall make it “ appear by affidavit to his Majesty’s Court of Exchequer that he “ is entitled to have execution against the defendant upon any judg- “ ment in such action, but that he has not been able to procure “ satisfaction by writ of execution against the goods and chattels “ of such defendant, it shall be lawful for the said Court, for the “ benefit of such plaintiff, to order and direct such proceedings to “ be had and taken upon such recognizances or bonds respectively “ as could be taken to obtain any fines or penalties due to his Ma- “ jesty, secured by such recognizance and bond ; provided always “ that the expense of such proceedings shall be exclusively borne “ by such plaintiff as aforesaid.” Barrett has been described in the declaration as “ printer and publisher,” and in the affidavit as the “ publisher,” and not as either “ editor, conductor or proprietor ;” the application has not therefore been brought within the terms of the statute ; and as this is a statute of a highly penal nature, it should be construed strictly, and the party applying to the Court should bring his case clearly within its terms: *Ex parte The Duke of Brunswick and Luneburg, in re The Recognizances of S. Clements and J. Thorburn, sureties of M. W. Crowl* (a). In that case it was decided expressly that the party applying under the 11 *G.* 4, and 1 *W.* 4, c. 73, s. 3, for liberty to enforce the recognizance of the sureties taken, pursuant to the

(a) 3 Exch. Rep. 829.

H. T. 1852. provisions of 60 G. 3, c. 9, should state distinctly that the principal was the "editor, conductor or proprietor." Pollock, C. B.,
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 THE QUEEN in his judgment, said:—"The defendant is here called the printer
 v. STAUNTON. "and publisher of the newspaper which contained the libel. Now, "the words of the statute are 'editor, conductor or proprietor,' and "he may not be either of these. The statute is of a penal character, "and the Court cannot extend the words for the purpose of assisting "the plaintiff. The defendant is not brought within the Act, and "therefore upon this ground alone the rule must be discharged, with "costs."

Napier, with *West*, in support of the rule,

The question discussed and decided in the case of *Ex parte The Duke of Brunswick (a)*, was again argued in *Ex parte The Duke of Brunswick and Luneburg, in the matter of The Recognizances of W. Lowe and John Clements, sureties of W. Ghislin (b)*, and the decision in the former case reversed. There the judgment in the libel case was against the publisher. And it would appear that in the affidavits used on the motion, that he was only described as the publisher; and that he was described "solely as publisher" is to be inferred from the argument for the defendant, which assumes it, and the observation of Pollock, C. B.:—"Then comes "the third section, which only mentions plaintiffs in actions for "libel 'against any editor, conductor, or proprietor' of such news- "paper. If it be construed to apply to a 'publisher,' it would "equally apply to any one who sent a libel to the newspaper." Still though only described as publisher, the rule was made absolute by the Court after full consideration.

Fitzgerald, in reply.

The case cited by Mr. *West* from the 6 *Exchequer Reports* cannot be supposed to overrule the antecedent case; for though it is referred to in the case from the 6 *Exchequer Reports*, and relied on, still there was no objection made to it either in the argument or judgment. It must be assumed then that it was recognised as law, and

(a) *Supra*

(b) 6 Exch. Rep. 22.

that the facts in the two cases were different. Besides, in that case the affidavit is not fully given, and it does not appear that the party was not described therein as "editor, conductor, or proprietor." The objections in that case were, that the judgment recovered was against the publisher, and that the fiat of the Attorney-General was necessary for a proceeding by *scire facias* under the 60 G. 3, c. 9, s. 22. The first objection is consistent with the assumption that on the motion it was shown that in fact the publisher was also "editor, conductor or proprietor."—[PIGOT, C. B. That objection, though mentioned in argument, does not appear to have been made the subject of consideration by the Court; the main question, and only one decided, was the necessity or not of the Attorney-General's fiat, and that objection being removed, the order was made.]—The other question does not arise here.

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The Crown is no doubt entitled to proceed for damages under the 11 G. 4, and 1 W. 4, c. 73, s. 2, against the publisher; but the question here arises on the 3rd section of that statute, and is, whether the subject is entitled to proceed to enforce the recognizances against sureties, without having first shown to the satisfaction of the Court that the action for libel was brought in fact against the "editor, conductor, or proprietor." And the Court are of opinion that he is not entitled to proceed without having first established that fact. With respect to the costs of this motion, the defendant has made an affidavit, which was quite unnecessary to raise the point of law upon which he has relied, and solely relied; and the practice of the Court is in such cases not to give costs.

Cause allowed, without costs.

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Replication—*Præcludi non* ; because he says, that after the making of the said articles of agreement in the declaration mentioned, and more than four years before the time that he the plaintiff became and was a bankrupt, in manner and form as in the said plea mentioned—that is to say, on the 17th day of April, A.D. 1845, at, &c., by indenture made between the plaintiff and Mary Kidd his wife of the first part, the Rev. Thomas Gregg and Robert Buchanan of the second part, and the Rev. Robert Hume of the third part (*profert*), in consideration of £800 paid to the plaintiff by the Rev. Robert Hume, the plaintiff assigned, &c., all that the said policy of insurance upon the life of the said George Kidd, which had been effected by the plaintiff with the Victoria Assurance Company of London, for the sum of £800, bearing date the 27th day of February, A.D. 1844, subject to redemption on payment of £800, with interest at £5 per cent., of which assignment afterwards, and before the plaintiff became a bankrupt *modo et formâ*, the said Victoria Assurance Company of London had notice. Averment—That the Rev. Robert Hume died, and that administration of all his effects, with his will annexed, was granted to Arthur Hume his son ; that the plaintiff did not pay the sum of £800 to R. Hume in his lifetime, or to the said A. Hume since his death ; and that the writ of summons in this suit was sued out in the name of the plaintiff on behalf of the said Arthur Hume, for the purpose of enabling the said Arthur Hume as such administrator to recover the damages for the said breaches of covenant in the said declaration mentioned, for the use and benefit of the said Arthur Hume as such administrator as aforesaid, and not for the benefit or use of the plaintiff.—*Verification.*

The defendant craved oyer of the deed of the 17th of April 1845, contained in the replication. The deed as set out upon oyer was to the following effect :—

It recited a policy of insurance for £300 effected in the British Commercial Life Assurance Company of London, in the name of Mary Watkins, afterwards the plaintiff's wife, dated the 27th of May 1840, on the life of one Richard Bloomfield, subject to an annual premium of £20. 13s. 3d. It then recited a policy for £200, dated the 27th of

September 1842, effected in the Provident Life Office on the life of one W. W. Childers, in the name of the plaintiff, subject to an annual premium of £5. 14s. 8d.; a third for £100, dated the 27th of October 1842, effected upon the life of one Valentine Hines, in the name of the plaintiff, subject to an annual premium of £36. 9s. 2d., with the Victoria Life Assurance Company; a fourth with the same Company in the name of the plaintiff, upon the life of the said George Kidd, for £800, dated the 27th of February 1844, subject to an annual premium of £32. 2s. 8d.; out of which annual premium it was subsequently agreed by the Company that a sum of £13. 6s. 8d. should remain upon credit until the year 1849. The deed then recited that each of the *cestui que vies* were then living, and that the premiums on each had been paid up to the last day of payment preceding the execution of the deed. It then recited a transfer to Messrs. Gregg and Buchanan of three shares in the Dublin and Drogheda Railway Company, and a deed dated the 23rd of November 1842, made between the plaintiff of the first part, Mary Watkins of the second part, and the Rev. Thomas Gregg and Robert Buchanan of the third part, being the settlement executed on the marriage of the plaintiff and the said Mary Watkins, whereby it was declared that the said shares in the Dublin and Drogheda Railway Company were vested in Messrs. Gregg and Buchanan, upon trust, with the dividends to pay to the Liberal Annuity Company the annual sum of £6. 6s. to entitle the said Mary Watkins to an annuity of £60 yearly in case she should survive the plaintiff, and subject thereto in trust to assign the said shares and all money due thereon unto the plaintiff, his executors, administrators or assigns; and that the trustees had agreed, pursuant to the said trust, to assign the said Railway shares, subject to the annual payment of £6. 6s. It then recited that the plaintiff, having occasion for the sum of £800, had applied to the said Rev. Robert Hume for the loan, to be secured by bond of the former, and the assignment of the said four recited policies of insurance, and the three shares in the Dublin and Drogheda Railway Company, to which the said Rev. Robert Hume agreed.

The deed then witnessed that in consideration of the sum of

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M. T. 1851. £800 paid to them, the plaintiff and Mary Kidd, according to their
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LOUGHNAN. insurance, together with all and every sum and sums of money to be at any time due and recoverable upon or by virtue of said policy, and all the estate, right, title and interest whatsoever of the plaintiff, his executors, administrators and assigns, in and to the said three policies respectively; to have, hold, receive, take and enjoy the said deed-poll, instruments or policies of insurance respectively, together with all and every sum and sums of money which at any time and from time to time should become due upon or by virtue of the same respectively; and also all and every other benefit and advantage to be had or derived therefrom either at law or in equity, unto the said Robert Hume, his executors, administrators or assigns. Then followed an assignment of the Railway shares by Messrs. Gregg and Buchanan, subject to the trusts of the deed of the 23rd of November 1842, and to the payment of the annual sum of £6. 6s., and to the proviso for redemption thereafter contained. Proviso, that if the plaintiff, his heirs, executors or administrators, should pay or cause to be paid unto the said Robert Hume, his executors, administrators or assigns, the sum of £800, with interest at £5 per cent., then and in such case the grant and assignment thereby made, and all and every the powers, provisoes, conditions, covenants and agreements (save only the present proviso or agreement) should cease, determine, and be utterly void, to all intents and purposes whatsoever; and the present deed, and the said several policies and shares, should thereupon be transferred to the said Rev. Thomas Gregg and Robert Buchanan, their executors, administrators or assigns, upon trust for the use and behoof of the plaintiff and Mary his wife, and the survivor of them, and the executors, administrators and assigns of such survivor.

The deed then contained a covenant by the plaintiff to keep the subsisting policies on foot, or to effect new ones to the same amount, with a power to Hume, in case of default by the plaintiff, to effect a policy or policies for the like amount in their joint names; the sums so advanced by him to be a charge upon the new policies: and then

followed a proviso that when and so soon as the said principal sum of £800 thereby secured, and interest, should have been paid, that thereupon the said Rev. R. Hume, his executors, administrators or assigns, should immediately assign the said four policies of insurance and the said Railway shares, or such of them as should be then subsisting, under the provisions thereinbefore contained, after the deducting all premiums and other outgoings; and that from thenceforth the said Thomas Gregg and Robert Buchanan should stand possessed of the policies and shares, or such of them as should be then subsisting, upon trust for the benefit of the plaintiff and Mary his wife, and the survivor of them, and the executors, administrators and assigns of such survivor.

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The deed being set out upon oyer, the defendant demurred generally and specially. The points of special demurrer were not insisted upon in the argument before the Court. The points noted by the defendant were:—

First.—That it appeared from the indenture of the assignment mentioned in the plaintiff's replication, and set forth in oyer, that the said John Kidd, after the said assignment was executed, continued interested in the policy of insurance in the said replication mentioned; and that after the execution of the said indenture, the said policy, and all other estate, moneys, property, goods, chattels and effects of the said John Kidd and Mary his wife, assigned by the said indenture to the said Robert Hume, as in the said indenture mentioned, subject to the payment of the sum of £800 and interest, belonged to and were the property of the said John Kidd and Mary his wife respectively, and therefore the assignees of the said John Kidd became and now are entitled to the said supposed causes of action in the said declaration mentioned.

Secondly.—That the replication was no answer to the defendant's plea, for it only referred to the assignment of the policy of insurance, and not to the benefit or advantage of the covenant in the plaintiff's declaration mentioned; that it did not state that the plaintiff by the said indenture or otherwise assigned to the said Robert Hume, or any other person, the said covenant in plaintiff's declaration mentioned, or the moneys or causes of action thereby

M. T. 1851. secured; or any advantage, estate, title or interest, derivable from,
Common Pleas. or incident to, the said covenant or to any breach thereof.

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Thirdly.—That the indenture as stated in the plaintiff's replication materially varied from, and was inconsistent with, the indenture as set out in oyer; that it was stated in the replication to be an assignment of the policy and moneys thereby secured, in the replication mentioned only; but it appeared from the indenture itself as set forth in oyer, to be an assignment of other policies and other properties also, to the said Robert Hume, in trust in the first place to secure the said debt of £800 and interest, and subject thereto for the said John Kidd, his executors, administrators and assigns, as in the said indenture mentioned.

M. Mahon (with whom was *Thomas O'Hagan*), for the defendant.

J. T. Ball (with whom was *Lefroy*), for the plaintiff.

The arguments relied upon will be found fully stated in the points noted for argument, and in the judgment of the LORD CHIEF JUSTICE.

The following cases were cited in support of the demurrer:—*Higden v. Williamson* (a); *Moth v. Frome* (b); *Robinson v. M'Donnell* (c); *Carpenter v. Marnell* (d); *Burn v. Carvalho* (e); *Leslie v. Guthrie* (f); *Parnham v. Hurst* (g); *Trott v. Smith* (h); *D'Arnay v. Chesneau* (i).

In support of the replication the following cases and authorities were relied upon:—*Spencer's case* (k); *Winch v. Keely* (l); *Master v. Miller* (m); *La Coste v. Gillman* (n); *Ex parte Marshall* (o); *Ex parte Thompson* (p); *Gladstone v. Hadwen* (q); *Attwood v.*

(a) 3 P. Wms. 133.

(c) 5 M. & S. 286.

(e) 1 Ad. & El. 883.

(g) 8 M. & W. 743.

(i) 13 M. & W. 796.

(l) 1 T. R. 619.

(n) 1 Price, 315.

(p) 1 Mont. & Bligh, 219.

(b) 3 Ambler, 394.

(d) 3 B. & P. 40.

(f) 1 Bing. N. C. 697.

(h) 12 M. & W. 688.

(k) 5 Rep. 16.

(m) 4 T. R. 320.

(o) 1 Mont. & Ayr. 118.

(q) 1 M. & S. 517.

Partridge (a); *Crowfoot v. Gurney* (b); *Dangerfield v. Thomas* (c); *M. T. 1851.*
Spencer v. Boyes (d); *Riddell v. Riddell* (e); *Rolle's Abr.*, p. 45; *Common Pleas.*
 2 *Co. Lit.*, by *Thomas*, p. 304; *Co. Lit.*, by *Hargrave*, p. 264, N, *KIDD*
n. 1; *Sugden's Vendors and Purchasers*, 11th ed., p. 726; 9 *Bythe-* *v.*
wood's Conveyancing, by *Jarman*, p. 355. *LOUGHNAN.*

Cur. ad. vult.

The judgment of the Court was now delivered by—

Nov. 25.

The LORD CHIEF JUSTICE MONAHAN.

This is an action of covenant, founded on articles dated 21st of December 1844, between the plaintiff, the defendant and one George Kidd.

Oyer of this deed has not been obtained; we must therefore take its contents from the declaration. These articles are stated to recite that George Kidd was indebted to the plaintiff in £800, and that it had been agreed that, to secure the same, the plaintiff should effect an insurance on the life of George Kidd for £800, and that George Kidd should pay the premiums for seven years, and procure the plaintiff sufficient security for the punctual payment thereof, and that the defendant Mr. C. Loughnan had agreed to become such security. That in pursuance of such agreement, the plaintiff had in his own name effected an insurance on the life of George Kidd with the Victoria Insurance Company. The deed or article then witnesses that the defendant, for himself, his executors and administrators, covenanted with the plaintiff, his executors, administrators and assigns, to pay, or cause to be paid, the premiums on the said policy when and as same should become due. It then states the several days of payment, and sums to be paid, the last payment being to be made on the 19th of February 1850. The declaration alleges, as a breach or breaches of the covenant, the non-payment of the premiums due on the 19th of February 1849, and 19th of February 1850, but does not allege any particular damages, or show whether the premiums

(a) 4 Bing. 209.

(b) 9 Bing. 372.

(c) 9 Ad. & El. 292.

(d) 4 Ves. jun. 370.

(e) 7 Sim. 529.

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were paid by any one, nor whether George Kidd survived the term for which the policy was effected, or in fact for what term the policy was effected, inasmuch as, though George Kidd or the defendant was bound to pay the premiums only for seven years, it does not appear whether the policy was not for a longer period.

To this declaration the defendant has pleaded, that before the commencement of the action, and before the commission of the breach of covenant assigned, the plaintiff became bankrupt in England, and the proceedings are set forth ; from which, however, it would appear, if the dates are to be taken as correct, that the bankruptcy proceedings were in October and November 1849, intermediate between the two breaches.

To this plea the plaintiff replied, that by deed dated the 17th of April 1845, the plaintiff assigned the policy of insurance to Robert Hume in consideration of £800, subject to redemption on payment of the said sum ; that the money was still due, and that the action was brought by the plaintiff at the instance and for the benefit of Mr. Hume's personal representatives. The defendant having craved oyer of this deed, it is to be considered as if the deed was set forth in the replication ; and having been set forth, the defendant demurs to the replication. The deed, as set forth on oyer, is dated the 17th of April 1845, and made between John Kidd and Mary his wife of the first part, the Rev. Thomas Gregg and Thomas Buchanan of the second part, and the Rev. Robert Hume of the third part. This deed, after reciting a policy of insurance effected by Mrs. Kidd on the life of a Mr. Bloomfield before her marriage, also certain Railway shares vested in Messrs. Gregg and Buchanan, the trustees of her settlement, on certain trusts, and also reciting the policy effected on the life of George Kidd, and other policies vested in the plaintiff, witnesses that the plaintiff and his wife and the trustees thereby assign all the policies and Railway shares to the said Rev. R. Hume, his executors, administrators and assigns, for his and their own use and benefit, subject as hereinafter mentioned. The deed then contains a proviso for redemption on payment of the £800, and a condition that the deed shall be void, save as to the following proviso—namely, that the said Robert Hume shall transfer the policies and other pro-

perty to Messrs. Gregg and Buchanan, the trustees of the said John Kidd and Mary his wife, and the survivor of them, and the executors, administrators and assigns of such survivor. This deed, it will be observed, contains no recital of, or reference or allusion to, the deed or articles between the plaintiff and the defendant Mr. Loughnan; and there certainly is nothing on the face of this deed to show that, at the time of its execution, Mr. Hume or any of the other parties to the deed, except the plaintiff John Kidd, were aware of the execution of Mr. Loughnan's covenant.

In this state of the pleadings the question to be decided on the present demurrer is—did the right to sue on the covenant entered into by Mr. Loughnan pass to the plaintiff's assignees in bankruptcy, or did it remain vested in the plaintiff as trustee of Mr. Hume, and the trustees Messrs. Gregg and Buchanan? It was in the first instance argued on the part of the defendant, that the benefit of this covenant was not assigned at all to Mr. Hume; that he did not contract or bargain for it; and therefore, even though he should be held to be absolute owner of the policy of insurance, still that he was not entitled to the benefit of this covenant. In order to determine this question, it will be necessary to consider not only the words but the nature of the covenant. It is a covenant with John Kidd, his executors, administrators and assigns, to pay or cause to be paid the premiums on the policy of insurance, not to John Kidd, but to the Insurance Company; and therefore it is clear that the performance of the covenant would enure for the benefit of the person entitled to the policy. And if we are to suppose the case of the policy being absolutely assigned to a third person, so that John Kidd retained no interest in it, it is clear that if the benefit of the covenant still remained vested in him, it would remain vested in him under circumstances that he would not be benefited by the performance of it, or prejudiced by the non-performance. If therefore the word assignees in the covenant in question is construed to mean assignees of the covenant, as contradistinguished from assignees of the policy, it is equally clear that the new assignees of the covenant, not being at all interested in the policy, would derive no benefit or injury from the performance or non-performance of it. This

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would lead to such irrational results, that we entertain no doubt that the word assignees in the covenant was intended to mean assignees of the policy, and that the effect thereof is that Mr. Loughnan covenants with John Kidd and whoever should be the owner of the policy, that he would regularly pay the premiums for the benefit of such owner for the time being. This being in our opinion the true construction of the covenant, the next question is—did Mr. Hume and the other persons deriving under the deed of 1845 become entitled to the benefit of it? Assuming that this deed operated as a complete transfer of the policy and all interest, then it is clear that the parties deriving under the deed would be the persons alone interested in the performance of the covenant. Still the question remains, were they entitled to sue for the non-performance of it, the plaintiff John Kidd being then trustee of this covenant? In my opinion, the moment the policy was effectually assigned to a third person by John Kidd, that third person, according to the very terms of the covenant entered into by Mr. Loughnan, became the person beneficially interested in the performance of that covenant, and entitled to have the performance of it enforced as against the defendant Mr. Loughnan. With respect to the objection that notice of the assignment was not given to Mr. Loughnan before the bankruptcy of the plaintiff, it occurs to me that as soon as the plaintiff ceased to be the owner of the policy, and that it was assigned so as to bind his assignees in bankruptcy, at the same moment he ceased to be interested in the covenant in question, and that it was not in his apparent ownership, within the meaning of that term in the Bankruptcy Laws. This being our opinion on this part of the case, it becomes necessary to consider whether, under the Bankruptcy Laws, the right to sue on the policy in question passed to the assignees of the plaintiff? It is quite unnecessary to refer to any of the numerous cases which have been cited, and which clearly establish that if a *chose in action* is assigned, or sold for valuable consideration by a trader to a third person before his bankruptcy, that the right to recover such *chose in action* does not pass to the assignees; nor to those cases which establish that though the assignment is not by way of absolute sale, but by way of mortgage,

or as security for a debt, that the right to sue does not pass to the assignee in bankruptcy if the debt secured exceeds the amount of the debt or *chose in action* assigned; more particularly, as all the cases on the subject are collected and referred to in the case of *D'Arnay v. Chesneau*, the latest case on the subject, in which we think the correct rule is laid down—namely, that if at the time of the bankruptcy, and not the original assignment, the debt secured is equal to or greater than the debt assigned as a security, the right to sue does not pass to the assignees. But if, on the other hand, the debt secured is at the time of the bankruptcy less than the debt assigned, so that out of the debt assigned, if received, the assignee would be entitled to retain any part of the sum received, for the benefit of the creditors, that in such case the right to sue passes to the assignees in bankruptcy notwithstanding the assignment. Accordingly, if in the present case the deed of 1845 was merely a security for the benefit of Mr. Hume, we should have to consider how the rule to which I refer would apply to a case like the present, where the *choses in action* assigned were not a single debt of an ascertained amount, but several policies of insurance not payable at the time of the bankruptcy, and the value of which at the time of the bankruptcy does not appear by any averment on the pleadings. But in the present case it has not been contended by the defendant's Counsel that the provisions in the deed of 1845 for the benefit of Mrs. Kidd are not valid and binding on her husband's assignees, or that if no bankruptcy had occurred, the moment the amount of the policies had been realised, that they should not be paid by Mr. Hume, after deducting the amount of his own debt, to Messrs. Gregg and Buchanan as trustees of Mr. and Mrs. Kidd, and the survivor of them; nor has it been contended that if the assignees were to receive the amount of the policies, they could immediately apply any part thereof for the benefit of the creditors; but, that after paying Mr. Hume's demand, *they* should retain or invest the surplus, in order that the same should be forthcoming in specie for Mrs. Kidd in the event of her surviving her husband. We cannot accede to this argument. We do not think Mrs. Kidd can have the assignees of her husband forced upon her as her trustees in the place of the

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M. T. 1851. trustees of her settlement, whom she selected ; nor do we think that
Common Pleas. continuing trusts such as these can be imposed upon assignees in
 bankruptcy. We do not mean to say that the facts in the case of
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the husband, who became bankrupt, had, not as here, the first life
estate in the proceeds of the sum to be recovered : but still we think
the principle of that case is applicable to the present, as is also
the rule laid down in 13 *M. & W.*, p. 110—namely, as at the time
of the bankruptcy, the whole fund, if then recovered, after paying
Mr. Hume's debt, should be paid over to Messrs. Gregg and Bu-
chanan, that the right to sue on the policy in question did not pass
to the plaintiff's assignees in bankruptcy. This conclusion we have
come to on the pleadings—namely, a demurrer to plaintiff's replica-
tion, setting forth the deed of 1845. If by rejoinder to that repli-
cation it could have been shown that the assignees had a present
interest in the policies or sums to be recovered in this action, as
that Mrs. Kidd was dead at the time of the bankruptcy, and the
chose in action of greater value than the debt due to Mr. Hume,
or that the bankrupt had before his bankruptcy paid the premiums,
which, by the deed, Mr. Loughnan ought to have paid, it might be
different ; but on the present pleadings we must overrule the de-
murrer, and give judgment for the plaintiff.

Demurrer overruled.

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(*Exchequer.*)

April 19, 20,
 23, 26, 29.

TRESPASS, for assault and battery and false imprisonment.

Second plea—Justification; “Because he says that before the said
 “time when, &c., the Right Hon. Francis Blackburne, then being
 “the Lord Chief Justice of Her Majesty’s Court of Queen’s Bench
 “in Ireland, duly and according to the power and provision of the
 “statute in such case made and provided, by his special order in
 “writing in that behalf, directed that one or more writs should issue
 “to one or more counties against the plaintiff, at the suit of the said
 “defendant, to hold the said plaintiff to bail for the sum of, &c.; and
 “thereupon and before the said time when &c., on &c., at &c., the
 “said defendant sued and prosecuted out of the said Court a certain
 “writ, directed to the Sheriff of &c., commanding him to take” &c.
 Averment of indorsement for bail and delivery to the Sheriff, and
 special warrant by the Sheriff, upon which the plaintiff was arrested;
 “*quæ sunt eadem,*” &c.

Replication—*Præcludi non*; “Because the order in writing of
 “the Right Hon. Francis Blackburne in said plea mentioned was
 “sued out and prosecuted, and the plaintiff taken and arrested there-
 “under, after the passing of certain Acts of Parliament, made and
 “passed in the 13th year of the reign of Her present Majesty, at
 “Westminster, the one entitled ‘An Act for the Regulation of
 “‘Process and Practice in the Superior Courts of Common Law

To a declaration in trespass for assault and battery and false imprisonment, the defendant pleaded justification under a Judge’s *fiat*, and *capias* issued under 3 & 4 Vic. c. 105, s. 2. The plaintiff replied that the *fiat* and *capias* were obtained and issued after the passing and coming into operation of the Process and Practice Act, and that no writ of summons had been sued out by the defendant.

Held, on special demurrer to the replication, that it was bad, because it did not negative the possibility of the action having been

commenced by *capias ad respondendum* before the Process and Practice Act.

Held also, that the plea was sufficient on general demurrer, although it did not show affirmatively that all the conditions necessary to found the statutory jurisdiction of the Judge to grant the *fiat* had been complied with.

Semble.—The Court would on motion set aside a *fiat* and *capias* obtained without a writ of summons previously sued out.

Quære, whether the *capias* in such case is irregular only, or void?

The cases on the subject reviewed.

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“ ‘in Ireland;’ and another entitled ‘An Act to Amend and Ex-
 “plain an Act for the Regulation of Process and Practice in the
 “ ‘Superior Courts of Common Law in Ireland,’ and after the last
 “day of Trinity Term 1850; and plaintiff saith a writ of summons,
 “according to the form prescribed by the said first mentioned Act,
 “or any other form, or at all, had not been, nor was at any time
 “before, or at the time of the taking and arrest of the plaintiff in
 “the said plea mentioned, sued out by or on behalf of the said de-
 “fendant in respect of the said sum of £49. 16s. 9d., in said plea
 “mentioned, or any other sum, or in respect of any other cause of
 “action whatsoever against the said plaintiff.”—*Verification.*

Demurrer, showing the following causes:—That although the replication admits that the order mentioned in the second plea was made by the Chief Justice of the Court of Queen’s Bench, yet that there is no allegation that such order had been duly set aside, nor are the grounds upon which it was set aside shown; and that it does not show that the Chief Justice had no authority, notwithstanding the passing of the Acts mentioned, to direct the plaintiff to be held to bail; nor that the order was void by reason of no writ of summons having been sued out previous to the plaintiff’s arrest; and that the replication is insufficient also, because the plaintiff thereby treats the said order, or *fiat*, as a nullity, whereas it must be deemed to be regular until varied or set aside by an order of Court; and that until set aside, the said order, or *fiat*, affords a legal justification for the arrest of the plaintiff; and because the replication does not form an answer to the plea, and is argumentative, &c.

Joinder in demurrer.

Brereton (with *J. D. Fitzgerald*), for the demurrer.

The main question is, whether the writ of *capias* is void, in consequence of no writ of summons having been sued out previous to the *fiat*? This is to be discussed with reference to Pigot’s Act, and the Process and Practice Act. The former, in giving the power to arrest upon a Judge’s *fiat*, uses the words “plaintiff and defendant:” but it has been decided that these words in an analogous English statute mean parties about to become so: *Schletter*

v. *Cohen* (a)—while the 4th section of the Process and Practice Act specially exempts from its operation 3 & 4 Vic. c. 105 (Pigot's Act.)—[PIGOT, C. B. That exception means no more than to preserve the power to issue a *capias* upon a *fiat*.]—Under the former practice, generally speaking, the only writ issued was that upon which the defendant was arrested, and there is nothing in the Process and Practice Act to prevent us arresting the party before issuing the writ of summons.—[PIGOT, C. B. It has been ruled in England that the writ of summons should be first issued, and it is my practice so to require; otherwise, of what Court would you entitle your affidavit to ground the *fiat* ?]—The affidavit need not be entitled in the cause: *King v. The Queen* (b); *Bullock v. Jenkins* (c). As to the English practice, the English Act 1 & 2 Vic. c. 110, was passed when the only mode of commencing an action was by writ of summons. The analogous Irish Act 3 & 4 Vic. c. 105, was passed long before the Process and Practice Act; and under the old practice it very frequently happened that the *capias* upon the Judge's *fiat* was the only process which issued in the action. There is no authority for holding that the *fiat* and *capias* are void. They are at best but irregular, and until set aside by the Court they afford a justification.

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B. Stephens, contra.

The question raised by the replication is, whether, without a writ of summons sued out, and an action commenced, the Judge has any jurisdiction to grant the *fiat* ? If not it is a nullity, and the *capias* must fall with it. Under the former practice, theailable *capias* might have been the only process sued out to bring the defendant before the Court, although it was called *mesne process*, because of the supposed original writ. But now the Process and Practice Act expressly requires that every action shall be commenced by writ of summons; and this is a condition precedent to the right to obtain the *fiat* and *capias*, for the arrest was and is a proceeding altogether

(a) 7 M. & W. 389.

(b) 18 Law Jour., N. S., Q. B., 255.

(c) 20 Law Jour., N. S., Q. B., 92; S. C. 1 L. M. & P. 645.

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collateral, and may take place at any time between the commencement of the action and final judgment (a). The Irish Act 3 & 4 Vic. c. 105, as to arrest on *mesne process*, is identical in its requirements with the English Act; and the English decisions establish that unless the writ of summons has issued, the Judge has no authority to grant the *fiat*: *Ireland v. Berry* (b); *Vizatelli v. Ricoff* (c); *Meale v. Snoulton* (d); *Brown v. M'Millan* (e); *Williams v. Griffiths* (f); *Bullock v. Jenkins* (g). But the plea is bad on general demurrer; for the Act requires that the *capias* should be executed within one month from its date, and that the *fiat* should limit the time within which it is to be executed. There are no averments to that effect in the plea, so that the Act does not appear to have been complied with, even by necessary intendment. It is also bad, because it does not aver that the conditions necessary to found the Judge's jurisdiction were complied with, viz., that a writ of summons was issued, or that the party was plaintiff in an action: 3 & 4 Vic. c. 105, s. 1; *Kenning v. Buchanan* (h). It is a rule of law that no presumption is to be made in favour of a plea which justifies under the exercise of a special statutory jurisdiction like the present. Every condition precedent to the exercise of such authority should be averred, although in the exercise of the Common Law jurisdiction of the Superior Courts regularity will be presumed until the contrary be shown: *Williams v. Griffiths* (i).—[PIGOT, C. B. The principle of that case was that the party must show under the Act that he has an interest in the writ; but the Court may have jurisdiction to arrest, though the plaintiff be not interested.]—*Christie v. Unwin* (k); *Harrison v. Wright* (l).

(a) 3 & 4 Vic. c. 105, ss. 1, 4, 5.

(b) 5 Q. B. 551.

(c) 9 Jur. 453.

(d) 2 Q. B. 322; S. C. 3 D. & L. 422.

(e) 7 M. & W. 196.

(f) 3 Exch. 584.

(g) 1 L. M. & P. 645.

(h) 3 Exch., Judgment of Parke, B., 588.

(i) 11 Ad. & E. 373.

(k) 13 M. & W. 816.

(l) 10 M. & W. 153.

J. D. Fitzgerald, in reply.

The replication is no answer to the plea, because it does not aver that the action was commenced since the Process and Practice Act. It may therefore have been commenced by *capias*. *Gossett v. Howard* (a), and the *Marhalsea case* (b), are authorities in support of the plea. The Court will not on general demurrer intend that the issuing of the *capias*, which is the act of a Superior Court, was illegal, by being after the time limited in the *fiat* and by the Act. If it were, that should have been replied. The statement that the process was duly sued out pursuant to the statute is sufficient. The case of final process is distinguishable. The statute does not create a new jurisdiction in the Judge, but limits the old; besides, the *capias* itself is not of the Common Law, but of the statutory jurisdiction of the Court, therefore the foundation of the plaintiff's argument fails. He cited also, *Greene v. Jones* (c); *Riddle v. Pakeman* (d).

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Cur. ad. vult.

PIGOT, C. B.

This case comes before us on a demurrer to the replication. The action is trespass [states the substance of the plea and replication,] and two questions arise; first, whether the replication sufficiently shows that no jurisdiction existed to issue a writ of *capias* founded on the *fiat* set out in the plea; and secondly, whether the plea is bad on general demurrer, supposing the replication successfully impeached. Assuming for a moment that the plea contains on the face of it sufficient to lead us to presume *prima facie* that the writ founded on the order of the Judge, as described in the plea, was valid, and that the Judge had jurisdiction to make the order, I am of opinion that the replication is no answer to the plea. The replication only negatives the issuing of a writ of summons; but consistently with its statements, the action may have been commenced by the issuing of a *capias* before the Process and Practice

April 29.

(a) 16 Law Jour., N. S., Q. B., 345.

(b) 10 Rep. 66 a.

(c) 1 Saund. 796, n.

(d) 3 Dow. P. C. 14; 2 C. M. & R. 30.

E. T. 1852. Act. The latter possibility therefore not being negatived, the replication misfits the cause of objection, and on that strict ground we must hold it bad.

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The main question is, whether impeaching the plea, on the ground that it does not aver the issuing of either summons or *capias* before the *fiat*, it is void on general demurrer? A number of authorities have been cited to show that both under the former and present practice, the issuing a *capias* under a Judge's *fiat* is a proceeding collateral to the action. Of this there is no doubt, and the action ought in strictness to be commenced by the issuing of the writ of summons before either *fiat* or *capias* is obtained. But all the authorities cited appear to be inapplicable to the particular question before us. I shall mention the principal of them. In *Brown v. M'Millan*, where the question was whether a *capias* on meane process, for a sum less than £50, could issue into a county palatine, it was contended that the proper course of the defendant was to move to set aside the Judge's order; but Baron Parke intimated that if the defendant's construction of 1 & 2 Vic. c. 110, s. 3, were right, the Judge's order was but waste paper, and the *capias* a nullity (a). From this it would certainly follow that a Judge's order made in cases not warranted by the statute is absolutely void. In *Bryant v. Clutton*, it was held, that the defendant in trespass must justify the suing out an attachment against the plaintiff. Alderson, B., there says:—"The defendant takes a piece of paper to the Marshal, and the Marshal keeps the defendant in custody in consequence of that piece of paper having been delivered to him. The defendant must justify that act" (b). But these questions arose on the general issue. What we have to determine however is the presumption arising from the statements in this plea. As to the cases cited for the proposition that a special statutory jurisdiction must appear on the face of the plea, those cases are not applicable to the present. In *Christie v. Unwin*, the action was *trover* by the assignee of a bankrupt, for goods converted after the bankruptcy, and the defence relied on was, that the order of the Chancellor under the 6 G. 4, c. 16, s. 18, by which the commission had been proceeded with, did not show upon the face of

(a) 7 M. & W. 198.

(b) 7 M. & W. 411.

it that certain requirements of the statute had been complied with. In *Muskett v. Drummond* a similar question arose, and in both cases the Court held that the order of the Chancellor, not showing on the face of it all the preliminary conditions necessary to support the special statutory jurisdiction, afforded no justification. In each of these cases, however, the question arose on evidence—on the effect of evidence produced, and not on pleading. They are therefore not applicable to the present case. The same observation applies to *Harrison v. Wright*, which was an action against a Sheriff, and in which a similar question arose on the evidence.

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The question before us is of a different character. The plea states the issuing of a writ of *capias* out of a Superior Court, and founds its justification on that and the Judge's *fiat*. It states that "the Right Hon. Francis Blackburne," &c. [states the plea]; and the jurisdiction of the Judge is stated to have been exercised thus: "duly and according to the power and provision of the statute in such case made and provided, by his special order in writing, in that behalf directed that one or more writ or writs should issue," &c.; and then the plea states the issuing of the *capias* on which the defendant was arrested. The first question then is, whether, from the statements in the plea, it is to be presumed, until the opposite be shown, that the jurisdiction was properly exercised? and if it is, then the main question argued, viz., whether the Judge had jurisdiction to make the *fiat*, upon which the *capias* issued, without a writ of summons previously sued out, and whether the proceedings are void for that infirmity—an infirmity which might have attached had the matter been brought before the Court on motion to set aside the proceedings—does not arise on the record. On this question we must presume, from the statements in the plea, that the authority of the Act was pursued, the contrary not being alleged.

There are some authorities to show that this view has been taken by Courts in similar cases. *Bullock v. Jenkins* (a) was relied on on both sides. That was an application to rescind an order to hold the defendant to bail; and the question did not arise on the record, but on the affidavit. An objection was taken that the affidavit did

(a) 1 L. M. & P. 645.

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not show that a writ of summons had been issued ; but Patteson, J., said :—“ It is not necessary that this should appear on the plaintiff’s affidavit ; and I think I must take it that the fact was proved “ before the Judge, or else he would not have made the order.” *Nightingale v. Wilcorson* (a) was an action against a Sheriff for an escape. The declaration, after setting out the writ, averred merely that it was duly marked or indorsed for bail for £25. Demurrer, that it was not alleged that any affidavit of the cause of action set forth, as required by the statute, was ever made or filed. The Court held that the absence of that allegation was not fatal. Baily, J., placed the judgment of the Court on two grounds :— First, that, independently of the statute, the Court retained a jurisdiction to arrest in some cases not within its purview. But secondly, he said :—“ We think the averments in the declaration sufficient, “ and that the writ, which is stated to have been issued out of this “ Court, is not to be presumed to have issued improvidently. The “ presumption is the other way,” &c. *Williams v. Griffiths* (b), relied on for the plaintiff, was an action on the case against a Sheriff for not arresting on a *capias*, issued under 1 & 2 Vic. c. 110. It decides that in such an action the declaration must show on the face of it that the party at whose suit the writ issued was a plaintiff in an action, either by allegation to that effect, or by stating that a writ of summons previously issued. On examination of that case, the point of it was, not that there was not that in the writ which would have constituted a protection to the Sheriff in an action against him for obeying it, but that there was not that in the declaration which showed that the plaintiff had an interest in the writ, so as to give him an action against the Sheriff (Judgment of Parke, B., p. 588). In a note to *Green v. Jones* (c), it appears that the plea there contained a reference to the affidavit of the cause of action ; but it is stated that such reference is now usually omitted, the indorsement on the writ being considered sufficient evidence of compliance with the Act. Now, surely the affidavit in that case is as necessary to found the jurisdiction as the issuing the writ of

(a) 10 B. & C. 202.

(b) 3 Ex. 584.

(c) 1 Saund. 294.

summons in this, yet it is held that there need be no averment of the former fact. *Riddle v. Pakeman* (a) is a case closely analogous to the present. It was trespass for false imprisonment. The defendant justified under process of outlawry. The plaintiff replied that there was no affidavit of debt made. The defendant rejoined that there was such affidavit, and set out an irregular one. On demurrer to the rejoinder, it was held that the process was voidable merely for the irregularity, and not void, and that trespass was not maintainable. Parke, B., said :—"Where the process is irregular "merely, no action can be maintained until it is set aside. An affidavit to hold to bail in trover without a Judge's order is irregular ; "but can it be contended that in such a case an action for false "imprisonment could be sustained ?" This case clearly indicates that in arrests under former statutes no action of trespass lay where the issuing of the process was merely irregular ; but that the existence of the process alone was a sufficient justification to both the Sheriff and the party. But that question does not arise here, for it does not appear that the requirements of the statute have not been complied with. If there had been in the replication an allegation that neither a writ of summons nor *capias* had been sued out previous to the *fiat*, we should have stated our views upon it. But on the present state of the record it is enough to hold that, from what appears on this plea, we must presume, in the absence of any contrary averment, that all was done which is required by the statute to found the jurisdiction of the Judge.

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GREENE, B.

The CHIEF BARON has so fully discussed all the authorities, that it will not be necessary for me to advert to them. The gist of the defence is the writ and warrant ; they form the justification ; and the question for the Court is the validity of these. The replication is bad, because it affects to set out facts to show that there was no jurisdiction for the issuing of the writ ; but it fails, because it is consistent with it that a state of facts may have existed sufficient to found the jurisdiction.

(a) 2 C. M. & B. 30.

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Whether the plea is bad on general demurrer, depends on the question as to what presumption arises on the facts appearing therein? The Court is called on, in the absence of any averment to that effect, to presume that no jurisdiction existed in the Judge who made the *fiat*, because certain facts on which that jurisdiction is founded are not stated. *Howard v. Gossett*, and the case last cited by the CHIEF BARON, are conclusive authorities on that point. In the latter case it was held that the process was merely irregular, and that it must be an absolute nullity to enable the party arrested to bring an action. Are we then to presume the writ here to be a nullity—that the jurisdiction did not exist, and to hold that it is incumbent on the party relying on it affirmatively to show its existence? This would be to invert the order of presumption, which is in favour of the regularity of the proceedings of a Superior Court. I am therefore of opinion that the plea is good on general demurrer, and that the replication is bad.

Judgment for defendant.*

* PENNEFATHER, B., *absente*.

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JAMES FITZMAURICE M'KENNA, Administrator of
 MARY M'KENNA, v. DE MOLEYNs.

(*Common Pleas.*)

Nov. 22, 24.

ASSUMPSIT.—The declaration contained two special counts and the common counts.

The first count, after stating that the said Mary De Moleyns in her lifetime had recovered, as of Trinity Term, A. D. 1842, a judgment against one Richard De Moleyns for the sum of £1662. 13s. 4d., together with costs; and that the said Mary M'Kenna, on the 30th of May 1845, had sued out a writ of *fi. fa.* upon the said judgment, directed to the Sheriff of the county of Kerry, indorsed, to levy the sum of £772. 3s. 10d., by virtue of which the said Sheriff seized divers goods and chattels of the said R. De Moleyns, then averred “that therefore, to wit, on &c., while the said Sheriff was so in possession of the goods and chattels in the said count mentioned, and when he was about to proceed according to the exigency of the said last mentioned writ, in consideration that the said Mary M'Kenna, at the request of the defendant, would then and there direct the said Sheriff to relinquish the said goods and chattels so by him seized in execution as aforesaid, and would abandon and forego the said execution, she the defendant then and there undertook and faithfully promised the said Mary M'Kenna that she the said defendant and the said Richard De Moleyns, and one Ventry De Moleyns, and one Eliza De Moleyns, would pay the amount

A declaration stated that A had recovered a judgment against B, on foot of which a *fi. fa.* issued to the Sheriff, under which he seized B's goods; that while the Sheriff was in possession of the goods, “in consideration that A would direct the Sheriff to relinquish the goods seized in execution, and would abandon and forego the execution,” the defendant promised that she and C D would pay the debt by annual instalments, and execute a bond for the amount. It then alleged that the Sheriff, by the direction of A, relinquished the goods, and

averred as breach non-payment of the money. The second count was to the same effect as the first, except that the breach assigned was the non-execution of the bond. At the trial it appeared that the defendant agreed to execute the bond in question, if “the keepers which were in charge of the goods were taken off, and the goods delivered to her.” *Held*, under these circumstances, that the Judge was justified in amending the declaration by stating in the averment of the consideration, “and would deliver over the goods and chattels to the said defendant,” and in the averment of performance the words “and did then and there deliver the said goods and chattels to the said defendant.”

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“thereof to the said Mary M'Kenna by yearly instalments of £100
 “until the whole should be paid off, and would forthwith execute to
 “her the said Mary M'Kenna their bond in writing obligatory, under
 “their hands and seals, in a certain sum of money, to wit the sum of
 “£1544. 7s. 8d., conditioned for the payment of a certain other
 “sum of money, to wit the said sum so then and there marked upon
 “the said writ; and although the said Mary M'Kenna, relying upon
 “the said last mentioned promise and undertaking of the defend-
 “ant, did afterwards direct the said Sheriff to relinquish the said
 “last mentioned goods and chattels so by him seized in execution
 “as last aforesaid, and did then and there forego and abandon
 “the said execution; and although the said Sheriff did thereupon
 “then and there, upon such last mentioned direction by the said
 “Mary M'Kenna, relinquish the said goods and chattels so by
 “him seized as last aforesaid, of all which the defendant then
 “and there had due notice,” yet, &c. The declaration then aver-
 red a breach in non-payment to Mary M'Kenna, and to the
 plaintiff as her administrator, of the sum due by the defend-
 ant.

The second count was in all respects the same as the first, with the exception of the breach, which was for non-execution of the bond. •

The defendant pleaded the general issue.

The case was tried before Mr. Sergeant Howley at the Summer Assizes 1851, for the county of Kerry, when the following facts appeared in evidence:—

At the trial the usual proofs having been given of the judgment recovered by Mary M'Kenna, and the writ issued thereon, one Thomas M'Kenna, the brother of the plaintiff, and son of Mary M'Kenna, was examined and proved the seizure made upon the 1st of June 1845, of the goods in the house of Richard De Moleyns; that he the witness, in consequence of some communication which he had received, called upon the defendant at her house; that the defendant upon that occasion asked him if his mother would arrange with her? to which the witness replied that his mother would not press the sale, if she got Captain De Moleyns' and his

children's joint bond for the amount of the execution, and that she would receive the debt by instalments of £100 a-year; that the defendant gave no answer that evening, saying she would communicate with her family on the subject; but on the following day informed the witness that some members of her family had refused to join; that the witness saw the defendant afterwards, on the day before that fixed for the sale, when the defendant expressed a wish that the sale should be adjourned, but ultimately proposed to pay the amount of the execution, and to get her brother and sister to join her in a bond for the amount of the execution, to be paid at the rate of £100 a-year, if the things seized were given up to her, and the keepers were taken off; to which the witness having agreed, the goods were accordingly given up, and the Sheriff's fees paid by the defendant. The witness further deposed that he afterwards was directed by the defendant to omit the name of her sister from the bond, and to have it prepared in the name of her father, her brother and herself; that he got a bond prepared pursuant to these instructions, and submitted to her, on which she refused to sign it, but said she would carry out the agreement and pay the £100 a-year, and that though her father died the next day, the payment should be continued. It was further proved that the defendant continued to reside in the house up to the year 1850, in which year her father died.

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The plaintiff's case having closed, the defendant's Counsel required his Lordship to nonsuit the plaintiff, on the ground that there was no evidence to support the common counts, and as to the two special counts on the ground that the evidence disproved them, the consideration stated in them being the relinquishing of the goods; whereas the consideration proved was the delivery of the goods to the defendant, and proof of such delivery. On the application of the plaintiff's Counsel, the learned Judge permitted the declaration to be amended, by stating in the averment of the consideration, "and would deliver over the said goods and chattels to the said defendant;" and in the averment of its performance, by stating "and did then and there deliver the said goods and chattels to the said defendant," reserving liberty to the defendant to move to have a verdict entered for her

M. T. 1851. *Common Pleas.* in case the Court should be of opinion that the amendment ought not to have been made. The jury found a verdict for the plaintiff for the sum of £550. 6s. 5d. A conditional order having been obtained to enter the verdict for the defendant pursuant to the leave reserved—

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Fitzgerald (with whom was *Leahy*) showed cause.

The 48th section of the 3 & 4 Vic. c. 105, embraces two classes of cases in which amendments may be made :—first, where the variance is not material to the merits of the case, and is one by which the opposite party cannot have been prejudiced in the conduct of his case ; and secondly, when the variance is not material, and the opposite party may have been prejudiced. The defendant cannot rely upon her having been prejudiced in her defence by the amendment, as the bill of particulars fully apprised her of the nature of the plaintiff's case ; and also inasmuch as in such cases she should have followed the course prescribed by the section under which the Judge might have compelled the plaintiff to withdraw the record and pay the costs of the day.

But secondly, this amendment was made in a matter not material to the merits of the case. The meaning to be given to the terms, "material to the merits of the case," has been settled by repeated decisions to be, material to the conduct of the case at *Nisi Prius* : *Duckworth v. Harrison* (a) ; *Harvey v. Johnston* (b). The promise, as stated, was an original promise, and not a collateral undertaking. If the Sheriff takes goods sufficient to satisfy the execution, the promise of a third party, in consideration of the withdrawal of the execution, to satisfy the debt, is an original promise. So in the present case, an independent promise to pass a bond is not a contract to answer for the debt of another, where it appears that the debt was capable of being realised by the sale of the goods seized. But assuming the amendment to have the effect of substituting a statement of an original for that of a collateral undertaking, such an amendment is justified by authority. In an unreported case of *Power v. Ewing*, which was an action by the executor of a deceased

(a) 5 M. & W. 427.

(b) 6 C. B. 295.

solicitor, the declaration was on the common counts for work and labour, and alleged promise by the testator. To this there was a plea of the Statute of Limitations, the plaintiff not being able to prove an admission by the testator within six years. The Chief Baron at the trial permitted the declaration to be amended, by introducing a count averring a promise by the executor; and the Court of Exchequer, after full argument, supported his Lordship's ruling.

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The following cases were cited: *Taylor v. Baker* (a); *Lear v. Edmonds* (b); *Jarmain v. Algar* (c); *Hanbury v. Ella* (d); *Duckworth v. Harrison* (e); *Hassall v. Cole* (f); *Gregory v. Duff* (g); *Cambie v. Barry* (h).

Lane (with whom was *Berkeley*), in support of the rule.

The cases cited are distinguishable from the present; in all those cases the defence would have been the same to the record as amended, or as it originally stood. The words, "material to the merits of the case," must be held to include the merits in point of law as well as in point of fact. The test proposed by the Court in the case of *David v. Pierce* (i) for the purpose of ascertaining whether a particular amendment be made in a point material to the merits of the case is, could the nature of the plea be thereby altered? In *Bouchier v. Murray* (k), the test proposed was, whether a new fact was introduced by the amendment? In either view of the case, the present amendment was made in a point material to the merits of the case. The case of *Harvey v. Johnston* (l) is distinguishable. There the consideration as originally stated was good; in this case the defendant, in order to sustain the promise as originally stated, must have proved it to be in writing.

(a) 2 Mod. 214.

(b) 1 B. & Ald. 157.

(c) 2 C. & P. 249; S. C., R. & M. 348.

(d) 1 Ad. & El. 61.

(e) 5 M. & W. 427.

(f) 13 Jur. 630.

(g) Ib. 706.

(h) 6 Ir. Law Rep. 319.

(i) 5 Q. B. 440.

(k) 6 Q. B. 362.

(l) 6 C. B. 295.

51. The following cases were also cited: *Cooke v. Stratford* (a);
 leas. *Gull v. Lindsay* (b).

NA

EYNS. *Leahy*, for the plaintiff, in reply, was stopped by the Court.

MONAHAN, C. J.

In this case we do not think it necessary to call upon the plaintiff's Counsel, inasmuch as we are all of opinion that the learned Judge was justified in making the amendment which he did in the present case. That there was a variance between the evidence and the record cannot be denied; and that it must have been in a certain sense in a material particular, is also undeniable; otherwise no amendment would have been necessary: it was in fact because the contract proved different from the contract as stated, that it became necessary to apply to the Judge to amend the declaration. But it is to cases of this kind that the statute applies, and accordingly the 48th section of the 3 & 4 Vic. c. 105, provides that in cases of variance not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, the Judge may cause the record to be amended upon such terms as he shall think proper; and then the second clause of the same section provides that "In case such variance shall be in some particular or particulars, in the judgment of such Court, or judgments, material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, &c., then such Court or Judge shall have power to cause the same to be amended, upon payment of costs to the other party, and withdrawing the record or postponing the trial." As the reservation is not to have the verdict entered for the defendant, on the ground that the defendant has been prejudiced by the amendment made at the trial, by not having witnesses to support her case, nor that she has been prejudiced by the nature of the plea—because, whether the declaration was amended or remained as it originally was, the defendant's plea, which in either case would be the general issue, would not vary—the only question which remains to us to consider is, whether

(a) 13 M. & W. 379.

(b) 4 Exch. 45.

this amendment was made in a particular not material to the merits of the case? Now the declaration states by way of inducement, that one Mary M'Kenna had recovered a judgment against one Richard De Moleyns; that she had sued out an execution upon foot of it; and that by virtue of this execution the Sheriff had made a seizure of the goods of the said Richard De Moleyns. This inducement is by the amendment left as it was, and the sole variance between the original and the amended count (the promise being the same in both) is, that one states that "in consideration " that the said Mary M'Kenna, at the request of the defendant, " would direct the Sheriff to relinquish the said goods and chattels " so by him seized, and would abandon and forego the said execution." And the count as amended states in addition to this, as a further consideration, "that he would deliver over the said goods and chattels to the said defendant;" the variance being only in the statement of a portion of the condition: and upon that point, we are of opinion that it was not in the least material to the merits of the case, whether the defendant made the promise in consideration of the withdrawal of the execution and of something else, or whether that formed the sole consideration for the defendant's promise. The authorities which have been cited in the course of the argument support this.

In *Harvey v. Johnston* (a), which was an action of assumpsit, the consideration, as stated in the declaration, was, that the plaintiff, at the request of the defendant would go to Lisahoppin for the purpose of marrying him, in consideration of which, the defendant promised the plaintiff to marry her in a reasonable time after her arrival there. The consideration, as stated in the declaration when amended, was, that in consideration that the plaintiff so then being sole and unmarried as aforesaid, at the request of the defendant there promised the defendant to marry him, and would go to Lisahoppin for the purpose of marrying him the defendant, and would within a reasonable time of her arrival there marry the defendant, he the defendant promised to marry her in a reasonable time after her arrival there. So that the promise being the same in both cases,

(a) 6 C. B. 295.

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the variance consisted in a portion of the consideration, something being by the amendment superadded to what was stated in the declaration. The decision of the Court of Exchequer, in the case of *Power v. Ewing*, is also in support of the power of the Judge to make this amendment—[states the facts of that case.]—It is not necessary for us to offer any opinion upon that case; it is sufficient to say it is a much stronger case than the present, inasmuch as the amendment there made was by the introduction of a new promise altogether, and not merely by altering the consideration upon which the promise was founded. The latest case is that of *Gull v. Lindsay* (a), in which the Court thought the amendment sought completely altered the cause of action as stated in the declaration. We do not think that case has any application to the present; and therefore, on the whole, are of opinion that the cause shown must be allowed.

(a) 4 Exch. 45.

MORRISSON v. M'ANASPIE.

Nov. 17.

By a lease made between R. J. B. and the defendant, R. J. B., "with the consent of R. J., mortgagee of the said premises, testified by his being a party thereto," demised to the defendant certain premises in the city of Dublin for eighty-three years, at the yearly rent of £36. The rent was reserved to, and the covenants made with, R. J. B., his executors, administrators and assigns, and the lease contained a proviso enabling R. J. B., his executors, administrators and assigns, to re-enter in default of payment of the rent for twenty-one days. R. J. was not named as a party to the lease, but it was signed, though not sealed, by him, and bore the following indorsement signed by him: "I have signed the within deed as mortgagee under the deed of mortgage, dated the 6th of August 1828, and I do hereby consent that the within named lessees shall hold the premises within mentioned, subject only to the payment of the rent reserved, so far as regards the within mortgage." The titles of R. J. B. and R. J. having become vested in the plaintiff, who brought an ejectment for non-payment of rent:—*Held*, that it could not be maintained under the circumstances; that as assignee of R. J. B., the plaintiff could not maintain it, inasmuch as in that character he was not entitled to re-enter, and as assignee of R. J., he was not entitled to the rent.

Semle—The above indorsement was not a sufficient article, minute or contract in writing, within the 25 G. 2, c. 13.

question which arose under the following circumstances. It being admitted on the trial that a year's rent was due, the case turned upon the plaintiff's right to recover the premises. In order to establish this, a lease was proved, dated the 2nd of May 1835, and made between Richard Jonathan Bird of the one part, and the defendant of the other, whereby the said R. J. Bird, "*with the consent and approbation of Robert Jones, of Peter-street, in the city of Dublin, Esq., mortgagee of the said premises, testified by his becoming a subscribing party thereto,*" demised to the defendants a plot of ground situate in Great Brunswick-street, in the city of Dublin (being the premises sought to be recovered in the present ejectment), to hold the said demised premises for the term of eighty-three years, *yielding to the said R. J. Bird, his executors, administrators and assigns*, the yearly rent of £36, with a proviso, that if the said yearly rent should be behind-hand for the space of twenty-one days after any of the days appointed for payment, that it should be lawful for the *said R. J. Bird, his executors, administrators or assigns*, to enter and distrain; and if no sufficient distress should be found, that it should be lawful for the *said R. J. Bird, his executors, administrators or assigns*, to re-enter upon the said demised premises. The covenants for the payment of rent were made with R. J. Bird, his executors, administrators and assigns. The deed was duly executed by the parties to it, and signed, but not sealed, by Robert Jones the mortgagee; but the deed contained a contemporaneous indorsement signed by him, and in the following terms:—"I have signed the within deed as mortgagee under the deed of mortgage dated the 6th day of August 1828, and I do hereby consent that the within named lessees shall hold the premises within mentioned, subject only to the payment of the rent within reserved, so far as regards the within mortgage." The plaintiff proved mesne assignments, by which the titles both of R. J. Bird and R. Jones became vested in him, and closed his case; upon which it was submitted on the part of the defendants that an ejectment for non-payment of rent could not be sustained, inasmuch as the lease of the 2nd of May 1835 appeared to have been made by a person not having a legal estate in the premises. The LORD CHIEF JUSTICE directed a verdict for the plaintiff, reserving liberty to the

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M. T. 1851. defendant to move to enter a nonsuit in case the Court should be
Common Pleas. of opinion that under the circumstances the action could not be sus-
 MORRISSON tained. A conditional order having been obtained for the purpose—
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R. Armstrong showed cause.

The lease is either evidence of an outstanding legal estate, or it is not; if it be not, then the plaintiff is entitled as assignee of R. J. Bird, the original lessor, to maintain the present ejectment; if it be, the memorandum is a sufficient minute or contract in writing within the 25 G. 2, c. 13: *Lessee Watson v. Clooney* (a).

Sherlock (with whom was *Butt*), for the defendants.

An ejectment for non-payment of rent can only be maintained where a right of re-entry exists: *Delap v. Leonard* (b). The right to re-enter is, by the lease of the 2nd of May 1835, reserved to R. J. Bird, who appears upon the face of that instrument to be a stranger to the legal estate; and the covenant for the payment of the rent to him is a mere covenant in gross, the benefit of which would not pass to his assignee: *Webb v. Russell* (c); *Stokes v. Russell* (d). The lease in question cannot work an estoppel, for the true title of R. J. Bird appears upon it, even supposing that the assignee of an estate by estoppel could take the benefit of such a condition, which, on the authority of *Whitton v. Peacock* (e), it would seem he could not.

But secondly, the memorandum indorsed upon the lease is not such an article, minute or contract in writing as is required by the statute 25 G. 2, c. 13; that statute only applies where the article, minute or contract is executed by the person entitled to the rent, and not where, as in the present case, it is executed by a third party. The effect of the construction contended for by the plaintiff would be, that the defendants might be ejected at the same time by either mortgagor or mortgagee. An ejectment on the joint demise of mortgagor and mortgagee cannot be sustained: *Doe d. Harvey v. Adams* (f).

(a) 1 Ir. Com. Law Rep. 58.

(b) 5 Ir. Law Rep. 287.

(c) 3 T. R. 393.

(d) Ibid, 678; S. C. 1 H. Bl. 562.

(e) 2 Bing. N. C. 411; S. C. 2 Scott, 630.

(f) 2 Tyrw. 289; S. C. 2 C. & J. 232.

O'Driscoll, in reply.

MONAHAN, C. J.

This is an ejectment for non-payment of rent, brought to recover certain premises, situate in Brunswick-street, in the city of Dublin, and demised to the defendants by a lease of the 2nd of May 1835. That lease was made by a person of the name of Bird, and professes to be made with the consent of one Jones, who is described as mortgagee of the premises; the rent being, however, reserved to, and the covenants entered into with, Bird, the mortgagor, to whom also the right to re-enter on non-payment of the rent is reserved: by a contemporaneous memorandum indorsed upon the lease, Jones agrees that the defendants shall hold the premises, subject to the rent reserved by the deed; and it has been contended that the plaintiffs, who are assignees of both Bird and Jones, are at all events entitled to maintain the present ejectment upon that memorandum, as being a sufficient "article, minute or contract in writing," within the statute 25 *G.* 2, c. 13. We do not accede to that construction of the statute; we think it was only intended to apply where the person executing such minute or contract was himself the person entitled to the rent; in which case it places him in the same position as regards the recovery of the lands, as if an actual demise were made; but we do not think it applies to a case like the present, in which the article, minute or contract was executed by one person, and the rent reserved to another. And supposing the effect of the lease of the 2nd of May 1835 to be a demise by both mortgagor and mortgagee to the defendants, we think the plaintiff, as assignee of the mortgagor, cannot maintain this ejectment, inasmuch as the mortgagor had no estate in the premises at the time of the execution of the lease; neither can he maintain it as assignee of the mortgagee, inasmuch as neither under the lease nor the memorandum was the latter entitled to the rent. The rule to enter a nonsuit must therefore be made absolute.

BALL, J., and JACKSON, J., concurred.*

Rule absolute to enter a nonsuit.

* TORRENS, J., *absente*.

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ROBINSON v. ROBINSON.

Nov. 13, 14.

Where an annuity was granted by deed to A, during the joint lives of B and C, charged upon the lands of Blackacre, and payable by two equal portions on the 1st of May and 1st of November in each year, upon trust to pay the same to B during the joint lives of B and C, and then to C if she survived:—*Held*, that C having survived B, and died on the morning of the 1st of May, A was entitled to the entire sum due upon that day.

THIS was an action of covenant.—The declaration contained one count, on the covenant of the defendant for the payment of an annuity of £45 during the life of Elizabeth Barry, and alleged a breach in the non-payment of £22. 10s. for one half year ending the 1st of May 1851.

The defendant pleaded—first, *non est factum*; and secondly, that the said Elizabeth Barry died before the said sum or any part thereof became payable.

At the trial, before Pennefather, B., at the Summer Assizes for the North Riding of the county of Tipperary, the plaintiff gave in evidence a deed of the 25th of February 1835, made between Thomas Stoney De la Pere Robinson of the first part, Samuel Barry and Elizabeth Barry his wife of the second part, and Robert Johnston Stoney and Augustus Robinson of the third part, which, after reciting a deed of equal date, whereby Samuel and Elizabeth Barry and their two children, Samuel Barry the younger and Brett Falkiner Barry, conveyed the lands of Bellpark and Carrigeen, situate in the county of Tipperary, to the said T. S. D. Robinson, his heirs and assigns, and further reciting that the interest of a sum of £1000, the marriage portion of Elizabeth, was charged upon the lands conveyed, for the benefit of her in the event of her surviving Samuel Barry the elder, and that she had agreed to accept in lieu thereof an annuity of £45, witnessed that the said T. S. D. Robinson granted to the said R. J. Stoney and Augustus Robinson, their executors, administrators and assigns, an annuity or yearly rentcharge of £45 for the life of the said Elizabeth Barry; and after the decease of the said Elizabeth Barry, then an annuity of £35 for the life of Samuel Barry, issuing out of the lands of Bellpark and Carrigeen, and to be payable by two even and equal half-yearly payments on every 1st day of May and 1st day of November,

the first payment to be made on the 1st day of May next ensuing the date of the present deed. The annuities were declared to be granted in trust to pay the annuity of £45 to S. Barry during the joint lives of him and Elizabeth Barry, then to pay the same to Elizabeth Barry for her life if she should survive; and if S. Barry should survive, to pay the annuity of £35 to him for his life. The deed also contained a demise to Robert J. Stoney and Augustus Robinson for a term of one hundred years to secure the annuities.

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It was proved that Elizabeth Barry died on the morning of the 1st of May 1851.

On the part of the defendant it was submitted that inasmuch as Elizabeth Barry did not survive the 1st of May, a verdict should be directed for the defendant on the second plea. The learned Judge, however, declined to adopt this course, and directed a verdict for the plaintiff on the issues joined on both pleas.

A conditional order for a new trial having been obtained, on the ground of misdirection—

O'Callaghan (with whom was *Coates*) showed cause.

The plaintiffs are entitled either to the entire gale which became due upon the 1st of May, or at all events to an apportioned part of it. It cannot be contended that the fact of the *cestui que vie* dying upon the day on which the gale became due can alter the case; if that were so, it would lead to this result, that while, if the *cestui que vie* had died before the gale day, the annuity would be apportioned and the annuitant entitled to a portion of the gale; if she dies on the gale day, the annuitant would lose the entire.

The terms of the 4 & 5 W. 4, c. 22, s. 2, do not in any respect confine the operation of the statute to cases in which the annuity continues, and the words, “And that every such person, his or her
 “executors, administrators and assigns, shall have such and the
 “same remedies at Law and in Equity for recovering such appor-
 “tioned parts of the said rents, annuities, provisions, dividends,
 “modusses, compositions and other payments, when the entire
 “portion of which such apportioned parts shall form part shall
 “become due and payable,” were only intended to restrict the

M. T. 1851. recovery of the apportioned part of the rent to the time at which
Common Pleas. the entire portion could be recovered. They cited *Lord Rocking-*
ROBINSON *ham v. Penrice (a); Earl of Strafford v. Wentworth (b); Southern*
v. *v. Bellasis (c).*
ROBINSON.

Meagher (with whom was *Macdonogh*), in support of the rule.

The declaration states that a certain sum became due in the lifetime of Elizabeth Barry, and this fact the plaintiff is bound to prove. The Apportionment Act, 4 & 5 W. 4, c. 22, has not the effect of accelerating the payment of the annuity, or making the apportioned sum payable before the entire gale is due, according to the terms of the original contract. If the plaintiff intended to proceed for an apportioned part, the declaration should have been specially framed for that purpose, stating the death of the annuitant between the gale days, and that thereby the annuity became apportionable under the statute.—[MONAHAN, C. J. Suppose this to be a case of apportionment, and that the *cestui que vie* died three months after a gale day, would not the plaintiff be entitled to bring the action after the next gale day ensuing the death of the *cestui que vie* for the apportioned part of the annuity? Here it appears that the action was not brought until after the time when the full gale became due; there is no attempt therefore to accelerate the payment.—JACKSON, J. No portion of the gale is due until the whole is payable; that was after the death of the annuitant. The words are, “when the entire portion of which such apportioned parts shall form part shall become due and payable;” that is, the apportioned part is not to be payable until the time it would have been payable if the party had lived.]—But secondly, annuities which determine with the death of the annuitant are not within the statute: *Oldershaw v. Holt (d)*.—[MONAHAN, C. J. That case was decided upon the ground that the relation of landlord and tenant was determined by the landlord’s own act.]

The cases of *Lord Rockingham v. Penrice*, and *Earl of Strafford v. Lady Wentworth*, were cases of rent services. This is a

(a) 1 P. Wms. 177.

(b) *Ib.* 180.

(c) *Prec. Chan.* 555.

(d) 12 Ad. & E. 590; S. C. 4 P. & D. 307.

rentcharge, and against common right. The gale of the annuity would not be due until midnight: *Co. Lit.* 135, *a*; *Duppa v. Mayo (a)*.

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Per Curiam.

We are of opinion that the cases of *Lord Strafford v. Lady Wentworth*, and *Lord Rockingham v. Penrice*, which have been cited in the course of the argument, are express authorities to show that in the case of an annuity which ceases on the death of the person entitled to it, if the annuitant lives to the beginning of the gale day, that will be sufficient to entitle the personal representative of the annuitant to the gale which became due upon that day. These cases have been decided upon the ground that otherwise the gale would be lost. The cases of rent which would go to the heir have no application then.

Cause shown must therefore be allowed with costs.

(a) 1 Saund. 286 b.

BARRY and others v. PURCELL.

H. T. 1852.
Jan. 11.

LANE, on behalf of the defendant in these causes, moved that the proceedings in the first cause might be stayed, on the ground that the writs of summons and replevin issued without the sanction of the plaintiff, and after the goods therein mentioned had been delivered to

The goods of several undertenants were seized by the head landlord under distress for rent due by the middle-

man, but were afterwards restored to their owners on a replevin issued by him.

The undertenants having subsequently sued out writs of replevin and summonses in replevin, pursuant to the 13 Vic. c. 18, in respect of the same seizure, the Court directed the proceedings to be set aside.

The writ of replevin does not apply where the goods seized are in the plaintiff's possession at the time of the issuing of the writ.

In proceedings in replevin under 13 Vic. c. 18, the plaintiff is bound both to serve the writ of summons in replevin, and also to sue out the writ of replevin.

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the bailiff of the Sheriff of the county of Cork, on a warrant upon a replevin at the suit of one Grace Maunsell against the defendant for the same distress, and which suit was still pending, and also inasmuch as the goods, the subject-matter of the first cause, had been restored before the issuing of the writ of summons, and were not then detained by, or in the possession of, the defendant; and "inasmuch as the warrant upon the replevin must have been obtained "by false representations," that the costs of the motion should be paid by the plaintiff's attorney.

The affidavit of the land agent of the defendant stated that on the 17th of December 1851, he distrained a quantity of oats and wheat, the property of the plaintiffs in the several above-named causes, who were the immediate tenants of one Grace Maunsell, who was herself a tenant to the defendant. That upon the 1st of October following, being the day fixed for the sale of the goods distrained, the deponent received a copy of a warrant issued by the Sheriff of the county of Cork, in a replevin at the suit of the said Grace Maunsell against the defendant; that upon receiving it he abandoned the distress, and delivered the goods seized to the Sheriff's bailiffs. That on the 5th of November 1851, the defendant was served, at the suit of Grace Maunsell, with a writ of summons in replevin, which had issued on the 24th of September preceding; and on the 6th and 7th of October following was served with seven other writs of replevin, issued at the suit of Thomas Nash, John Cleary, Daniel Hanna, Patrick Barry, John Fox, Arthur O'Connor and Michael Barry, her undertenants, for the goods distrained, which were the same as those included in the replevin issued by Grace Maunsell, and afterwards returned; and that upon the 28th of November following he was served with seven writs of summons in replevin at the suit of the same parties. The affidavit stated that the deponent believed the actions were brought without the sanction of these parties, and for the purpose of harassing the defendant. The affidavit of the plaintiffs' attorney denied the latter allegation, and stated they were advised to issue the replevins in the names of the respective owners of the goods, inasmuch as the replevin at the suit of Grace Maunsell could not be supported on a plea of no property.

R. Armstrong, for the plaintiffs in the several causes.

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Under the Process and Practice Act, the action of replevin commences by a writ of summons in the same manner as other actions. A writ of replevin is only issued where a party requires to get back the goods distrained, and not where he intends to try the validity of the distress. Under the former practice, if the goods distrained had been delivered back, that would not prevent the plaintiff from proceeding with a replevin.—[MONAHAN, C. J. I do not think you could bring replevin where the goods were in your own possession at the time of the issuing of the writ. To do so would be converting the action of replevin into a common action of trespass.—BALL, J. What is the meaning of the term—desirous to proceed by replevin? Does it not imply that the goods are not in possession of the party issuing the writ?—The return of the goods is merely incidental to the action of replevin, which is to a certain extent a co-ordinate remedy with *trover*.

J. S. Green, for the plaintiff's attorney.

Leahy, in reply.

MONAHAN, C. J.

In this case we are of opinion that the proceedings are irregular, and must be set aside. We do so on the ground that it appears to us that the plaintiff had no right to issue a writ of replevin in a case in which the goods were in his own possession at the time when the writ was issued. Undoubtedly, the action of replevin is in form an action for the illegal taking of goods; but it is substantially a proceeding for the purpose of obtaining the *return* of goods illegally taken; and we should be defeating the purpose of such an action, if we held that it applied to a case, in which the party seeking the return of the goods was in possession of them, at the time when the proceeding is taken to recover them. In the present case, we think the plaintiff was bound under the present practice not only to commence the action as he has done, by writ of summons, as provided by the 11th section of the 13 Vic. c. 18, but also to sue out a writ of replevin, as provided by the 12th section of that statute; and that not being in a position, as it appears to us, to

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adopt this course, the proceedings are irregular, and must be set aside. Under these circumstances, it would be a matter of course for us to set aside the proceedings with costs—but with costs to be paid by the plaintiff, not by his attorney. But the notice of motion states that the warrant upon the replevin must have been obtained upon false information, and founded upon that, applies for costs of the motion against the plaintiffs' attorney personally. That is the only ground upon which there can be any reason for bringing the attorney for the plaintiff, personally before the Court: and that charge having been brought, and it appearing that the attorney had the written authority of his client to institute the present proceedings, we think the defendant must pay the costs of the plaintiffs' attorney attending upon the present motion. As a consent to consolidate the cases had been served, we only allow the costs of one motion.

ORDER—That the proceedings in these causes be set aside without payment of costs, and that the defendant do pay Messrs. Carroll and Barry, the plaintiffs' attorneys, the costs of this motion.

E. T. 1852.
April 19.

BATEMAN v. SNEYD.

Where the plaintiff's attorney, in reply to a notice requiring security for costs, undertook to meet the defendant's attorney at the office of the Master of the Court, for the purpose of measuring the security, and afterwards attended pursuant to such undertaking, but the defendant's attorney did not attend, in consequence of which the amount of the security was not measured; the declaration having been filed, and the rule for judgment entered, the Court, under the above circumstances, refused an order to compel the plaintiff to give security for costs.

NORMAN, on behalf of the defendant, moved that the plaintiff in this cause might be compelled to give security for costs, under the following circumstances:—

On the 16th of February 1852, the defendant served the usual notice upon the plaintiff, requiring him to give security for costs, and to attend on the 19th of February following, before the Master of the Court, for the purpose of having such security measured. To this notice the plaintiff's attorney replied, stating that he would attend at the office of the Master of the Court at the time appointed. On the 19th of February, at the hour of twelve o'clock, in com-

pliance with this undertaking, he accordingly attended at the day and hour specified, but the defendant's attorney not being in attendance, the Master of the Court declined to measure the security in his absence.

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On the 24th of February the plaintiff's declaration was filed, and the rule for judgment entered on the same day.

Norman, for the defendant.

The defendant is entitled to the security he seeks, under the 79th General Order. The effect of that Order is, that the notice served has the effect of an order of the Court, and binds the party to comply with it. That was so decided in the case of *Tyne v. Pell (a)*. In that case the defendant's attorney entered an appearance, and then served notice on the plaintiff's attorney to stay proceedings until security for costs was given. The plaintiff's attorney answered:—"In reply to your notice, I will be prepared to give the necessary security." Notwithstanding this letter, the plaintiff marked judgment, which however the Court set aside, holding that the defendant's notice and the plaintiff's undertaking were tantamount to an order of the Court to stay proceedings, until security for costs was actually given. By the 81st General Order:—"In case the Court shall make "no order for such security, the defendant shall have the same time "for pleading, after such security shall have been given, as he had at "the time of the service of the notice of motion."

MONAHAN, C. J.

This motion cannot be granted. The defendant's attorney having required the plaintiff to give security for costs, the attorney of the plaintiff undertakes to do so, not generally, but at a specific time and place. He attends pursuant to his undertaking, but the defendant or his attorney is not in attendance. It is quite plain that the defendant has complied with his undertaking; and if we were to grant this motion, we would be enabling the defendant to delay the plaintiff's proceedings for an indefinite period by neglecting to comply with his own undertaking; and we cannot interfere to prevent the plaintiff from marking judgment where any difficulty, in which the defendant is involved, is the result of his own delay and neglect.

(a) Not reported.

E. T. 1852.
Common Pleas.

SNOW v. IRWIN.

April 20.

A permanent lodger, who has no other fixed place of residence, is a resident within the meaning of the 14 & 15 Vic. c. 57 (the Civil Bill Act), in the county or city in which such lodgings are situate.

MACDONOGH moved, on behalf of the defendant, that the judgment entered in this cause for the plaintiff, for the sum of £12. 10s. 6d. damages, and the further sum of £15. 12s. 5d. costs, might, so far as related to the said costs, be set aside, on the ground that the action (which was in assumpsit, and in which a sum less than £20 had been recovered) was brought after the statute 14 & 15 Vic. c. 57, came into operation, and that the plaintiff and defendant both resided within the jurisdiction of the Civil-bill Court of the county of the city of Dublin, being the county in which the cause of action arose; or that a sum of £5 only might be added to the judgment for the costs of the action, pursuant to the statute 13 Vic. c. 18. It appeared by the affidavit of the defendant that the present action was brought to recover the balance due upon a bill of exchange for £20, accepted by him, at three months, and dated some time in the month of September 1851; that this bill had been a renewal of a former one, which itself was also a renewed bill, and that they were each made payable at No. 14 Granby-row, in the city of Dublin.

The affidavit of the defendant stated that his fixed place of residence was No. 14 Granby-row, in the city of Dublin; that he was an attorney of the Court of Common Pleas, and that all communications which passed between him and the plaintiff in the progress of the present action were addressed to him at the above residence. That having occasion to go to Rathbride, in the county of Kildare, where he kept stables by the year, but had no fixed place of residence, and only a bed-room in the house where his trainer resided, he received a letter from the plaintiff's attorney applying for the £12, the balance due upon the bill in question, together with 10s. 6d. costs, which letter was after forwarded to the defendant from No. 14 Granby-row, to which place it was addressed. That the defendant replied to this letter, dating it from Rathbride-house:—that on the

15th of January 1852, he was served with the writ of summons in the present case, in the hall of the Four Courts, upon which he caused a cautionary notice to be served upon the plaintiff's attorney, apprising him that he should have proceeded by process in the Civil-bill Court of the city of Dublin, both parties residing within its jurisdiction; to which the plaintiff's attorney replied, that inasmuch as the defendant's letter was dated from Rathbride-house, and as he was informed that his residence was there, and not in Dublin, he would proceed with the action unless the debt and costs were paid before the following Thursday.

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The affidavit of the plaintiff's attorney stated, that at the time he wrote the letter of the 24th of December, he was ignorant of the defendant's place of residence, and that he addressed the letter to him at Granby-row in consequence of the bill having been made payable there. That he had received in reply the above mentioned letter, dated from Rathbride house. That he had caused inquiries to be made at 14 Granby-row, and that his messenger had been informed by the servant that the defendant stopped there when he came to town, but that he was then in the country; that he had been informed that the defendant's residence was at Rathbride house, and that his name was not in the list of attorneys in the Post-office Directory for the year 1852.

Macdonogh, in support of the motion.

The 66th section enacts:—"That where any defendant to any
"civil-bill shall be a lodger in any house in which his landlord shall
"also reside, service of any civil-bill process within such dwelling-
"house upon such landlord so residing, or upon the wife, child or
"servant, being of the age of sixteen years or upwards, of such
"landlord, and posting a copy of such process upon the usual place
"for posting notices, on the nearest police-barrack to the house in
"which the defendant shall so lodge, shall be deemed good service
"of such civil-bill process upon the said defendant; provided that
"it shall appear to the satisfaction of such Assistant-Barrister that
"due diligence had been used to effect personal service upon the
"defendant, or service upon his wife:" which shows that it was

E. T. 1852. intended that lodgers should be deemed residents for the purposes
Common Pleas. of the statute.

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J. D. Fitzgerald and Carr, contra, referred to 9 & 10 *Vic.* c. 95, ss. 128, 129; and to 14 & 15 *Vic.* c. 57, ss. 40, 65, 66 & 69; *O'Donnell and Brady's Civil-Bill Jurisdiction*, p. 7; *Cox and Lloyd, Practice of the County Court, Appendix*, p. 165; and to *Mathews v. Basinghall* (a); *Meetan v. Nicholls* (b); *Barnell v. Colson* (c).

MONAHAN, C. J.

We are all of opinion that this motion must be granted. In this case the defendant had a permanent lodging in Dublin, and no other fixed place of residence; and in our opinion, a permanent lodger is a resident within the meaning of the Civil-bill Act. The circumstance of the bill having been made payable at a particular place might have put the plaintiff upon inquiry; but his attorney having chosen to proceed in the Superior Courts, a cautionary notice is served upon him, apprising him that both parties were amenable to the jurisdiction of the Civil-bill Court; and that if he proceeded with the action in the Superior Courts, he should do so at the peril of costs. Notwithstanding this notice, he persists in prosecuting the action in this Court, and now claims his full costs.

The 66th section of the 14 & 15 *Vic.* c. 57, provides for the service of lodgers; and that appears to us to be a legislative declaration, that a lodger may be a resident within the meaning of that Act: and if the plaintiff reside within the jurisdiction, if the cause of action arises there, and the defendant be amenable there, the 40th section of the Civil-bill Act applies. All these circumstances concur in the present case, and the motion must therefore be granted, and with costs.

(a) C. & M. Co. C. Cas. 185.

(b) *Ib.* 123, 206.

(c) *Ib.* 202.

E. T. 1852.
Cr. Appeal.

Court of Criminal Appeal.*

THE QUEEN v. JOHN AHEARNE.

April 14.

THIS case was reserved by MOORE, J., from the last Spring Assizes of the county of Waterford.

The case stated that the prisoner was tried and convicted on a charge of conspiracy to murder one James Troy, and which murder was effected on the 27th of October 1851.

The indictment charged, that the prisoner John Ahearne, Maurice Ahearne and Patrick Power, conspired with each other, and with others unknown, to murder the said James Troy. The three prisoners named in the indictment were in custody, and were arraigned, and severally pleaded not guilty; but having refused to join in their challenges, the Counsel for the Crown put the prisoner John Ahearne on his trial, and he was accordingly given in charge to the jury sworn to try him.

A prisoner was charged on an indictment that he and two others conspired with each other, and others unknown, to murder J. T. The three prisoners were in custody and arraigned, and severally pleaded not guilty; but refusing to join in their challenges, one was put on his trial, and the evidence affected him and the other two named in the indictment: there was no evidence to show that any other person was engaged in the conspiracy. *Held*, that it was not neces-

The evidence given on the part of the Crown tended to affect the prisoner John, and also the other two prisoners named in the indictment, and made a case to go to the jury as to a conspiracy by the three; but there was no evidence to show that any other person besides those named in the indictment was engaged in the alleged conspiracy.

sary that the other two prisoners should have been tried with him, though they were amenable to justice, because, being found guilty by an unexceptionable verdict, judgment must follow.

* LEFROY, C. J.;† MONAHAN, C. J.; CRAMPTON, J.; MOORE, J., and GREENE, B., presiding.

† MEMORANDUM.

In the Vacation after Hilary Term The Right Hon. FRANCIS BLACKBURNE was appointed Lord Chancellor, and The Right Hon. THOMAS LEFROY, then Baron of the Exchequer, was appointed his successor in the Court of Queen's Bench, and took his seat on the 14th of April 1852. The Right Hon. RICHARD WILSON GREENE was appointed Baron of the Exchequer in the place of BARON LEFROY.

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The jury found the prisoner John Ahearne guilty. He was brought up for judgment on the following day; and the Counsel for the prisoner then objected that, on the above state of facts, he could not by law have been tried alone for the conspiracy, but that the other two persons named in the indictment, being amenable and having pleaded, should have been tried along with him.

The learned Judge took a note of the objection, and passed sentence of death.

Counsel for the prisoner certified as their opinion that the objection made was a serious one, and ought to be submitted to the Court of Criminal Appeal; and the case was accordingly reserved.

Curtis and *Meagher* appeared for the prisoner.

A single person cannot be tried on a charge of conspiracy, unless the other persons concerned be not amenable to justice: *King v. Sudbury* (a). If the words, "with others unknown," were out of the indictment, John Ahearne could not be tried alone, as the other prisoners were amenable, and had pleaded. *Thody's case* (b): "If one be acquitted in an action of conspiracy, the other cannot be guilty; but where one is found guilty, and the other comes not in upon process, or if he dies hanging the suit, yet judgment shall be upon the verdict against the other."

This record contradicts itself; there is a judgment of guilty against Ahearne, and he cannot be guilty of the conspiracy unless the two indicted with him be guilty, and they by the record are not found guilty: *The King v. Cooke* (c). There it is said, *arguendo*, that there is neither case or *dictum* to be found, that where there is an indictment against two for a conspiracy, both plead, and one has been tried, but not the other, the Court can proceed to give judgment against the one. If the Court pronounce judgment, repugnancy will appear on the record, for it may be, if the other prisoners be tried, they may be acquitted.

The *Attorney-General* (Napier) and *Hayes*, for the Crown.

A conspiracy to murder is in this country a felony, and it is

(a) 1 Lord Ray. 484.

(b) 1 Vent. 234.

(c) 5 B. & C. 538.

argued that if these men had not pleaded, the conviction would be quite right.—[CRAMPTON, J. In that case cited from *Ventris*, the prisoners had not pleaded, which causes a difference from the present; but the trial was not erroneous, and the matter there was brought before the Court on application to its *discretion* to stay the entry of the judgment until the other persons charged were tried.]—The conviction here was legally right; and on analogous cases, the Court will not stay judgment on the possibility of a contradictory verdict: *Rex v. Kinnersley* and *Moore (a)*. As against John Ahearne, he is concluded by the present verdict: *The King v. Nicols (b)*. Where two conspire, and one dies, the other may still be indicted for the conspiracy.—[CRAMPTON, J. Is the question before us one of law or practice? Suppose the indictment were against the three: the prisoner's Counsel say less than two could not be tried together on this charge; then there must be error on the record. I am reading the indictment as if the words, "with others unknown," were struck out; then it would appear only one person was tried: that is error on the record, and the Court then has no jurisdiction.—MONAHAN, C. J. We have no jurisdiction to expunge from the record the words, "with others unknown."—LEFROY, C. J. As the record is made up artificially, the prisoner would be prevented coming here on a writ of error; is he not then entitled to ask the Court should the sentence be followed by judgment?—If three be indicted for a conspiracy, it is not incumbent on the Crown to try them all together, and the possibility of inconvenience to the prisoner is no ground to stay a trial. *Fitzh. Nat. Brev.*, p. 115 :—"In a conspiracy against two, one pleaded to the writ and the other matter in law which is adjudged for him, and the plea unto the writ found by verdict against him who pleads it, the plaintiff shall have judgment against him who pleaded to the writ; but if both had pleaded not guilty, and one had been found guilty, and the other not, there the plaintiff should not recover, for then he did not conspire, as is supposed by the writ."

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Meagher, for the prisoner.

The three prisoners are in custody on this charge of conspiracy to

(a) 1 Stra. 193.

(b) 13 East, 412 (in note.)

E. T. 1852. murder—a matter of life and death; and if the other two prisoners
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 THE QUEEN were subsequently acquitted, Ahearne, who had been previously
 v. convicted, would be, *ipso facto*, acquitted: *Lord Sanchar's*
 AHEARNE. *case (a)*; *Marsh v. Vauhan (b)*. The judgment therefore against
 John Ahearne ought to be respited until the other prisoners be
 tried. The 38 *Edward 3* is the origin of the cases, and *Thody's case*
 is an exception to the general rule, and so is *The King v. Nicols*.
Rex v. Cooke shows clearly that if all the prisoners be amenable,
 they should all be tried together. An accessory cannot be tried
 until the principal be convicted, except by his own consent; and
 the reason for that is given in *Year Book*, 8 *Hen. 5*, case 26. Judg-
 ment therefore should not have been pronounced, but should have
 been respited. In 1 *Hale's P. C.*, p. 623, it is laid down:—"The
 "accessory shall not be constrained to answer to his indictment
 "until the principal be tried: 9 *Edw. 4*, 48 *a*; but if he will
 "waive that benefit, and put himself upon his trial before the prin-
 "cipal be tried, he may, and his acquittal or conviction upon such
 "trial is good."

Hayes replied.

LEFROY, C. J.

We are unanimously of opinion that no ground has been stated
 on which the judgment should be respited or arrested. The argu-
 ment really applies to the respite of execution, and not properly to
 the respite of judgment; and the only ground for that argument
 would be equally contrary to the first principles of law, as it would
 be contrary to public convenience and public justice. A person
 properly tried and found guilty by a verdict unexceptionable is
 bound by that verdict and its consequences. It is a necessary
 and legal result of a verdict that there be a judgment upon it,
 unless there be a respiting or arresting of that judgment.

In the cases in which two have been indicted for a conspiracy, or
 in an action against two for a conspiracy, where one pleads and the
 other does not appear to plead, and judgment follows against the one,

(a) 9 Rep. 119.

(b) Cro. Eliz. 701.

the reason is pointedly given in *Brooke Abr.*, tit. *Conspiracy*, pl. 21. Two are indicted for a conspiracy, and the verdict finds that the one conspired with the other; that verdict binds the man tried, not the other untried, and what difference is there, if he be the one outstanding and not the one appearing? What is the ground suggested here? the possibility that on a future trial the other person pleading may be acquitted; but that ground will hold in the case of one outstanding, and not made amenable. Every person against whom there is a verdict is liable to its consequences; and if a judgment be entered, and left to the proper tribunal to respite its execution, the Crown can then ascertain if the circumstances be such as that a second trial and verdict may be desirable before the execution of the judgment of the first. A second trial may fail, from a variety of circumstances; but at once to stop short the judgment, and interfere with the administration of justice, would be in effect to prevent judgment ever being carried out. The ground of inconvenience has been in all cases suggested, and by the Courts disregarded; why should the Court presume against this verdict that the subsequent one may be different?

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Cr. Appeal.
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MONAHAN, C. J.

I entertained a doubt as to whether sentence could be passed under the circumstances stated here; but on consideration, I think if the Court conclude that a trial was rightly had, the judgment must follow. The argument of inconvenience applies *a fortiori* to the case of *Rex v. Cooke*, where an inconsistency appearing on the record, the Court felt bound to act on the verdict and proceeded to judgment.

The rest of the Court concurred.

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Queen's Bench

THE QUEEN, at the prosecution of DANIEL GRIFFIN,
 v.
 THE GOVERNORS AND GOVERNESSES OF ST. JOHN'S
 HOSPITAL, Limerick.

(*Queen's Bench.*)

April 17.

Where an hospital, supported by a voluntary subscription, was recognised by a public Act, which Act directed certain sums to be paid out of the public money for purposes therein specified:—

Held, that such hospital was not thereby constituted a corporation within the meaning of 5 & 6 G. 3, c. 20.

Held also, that the governing body of such hospital may enact a bye-law by virtue of which the members may vote by proxy in the election of medical officers.

Quare—Would such bye-law be valid in the case of a corporation?

To create a corporation by implication, the implication must be a necessary one, and such as is absolutely essential to the duties to be performed.—*Per LEFROY, C. J.*

In this case a conditional order had been obtained, that a *mandamus* should issue, directed to the defendants, commanding them to assemble and meet together on a convenient day, and declare that, at the election of a physician for said hospital, held on the 19th and 20th of January, Doctor Robert Gelston was not duly elected to be physician thereof, and that Doctor Daniel Griffin was duly elected as such physician; and afterwards to admit the said Doctor Griffin to the said office, on the grounds of the reception of votes at the said election, which ought not to have been received from persons not qualified to vote thereat, and also of persons not attending in person at the said election, but voting by proxies thereat, and by reason of the rejection of voters duly qualified to vote thereat.

Affidavits were filed as cause against this conditional order, and the principal question raised was, whether this body, being a corporation, were entitled to vote by proxy, in pursuance of a bye-law made to that effect? Other objections were raised to particular votes, which it is unnecessary to detail.

The *Attorney-General* (Napier), with him *Deasy* and *C. Barry*, moved to make absolute this conditional order.

This hospital being a corporate body, by the general rule of law, the members of it were not entitled to vote by proxy. The whole course of legislation shows that, if not actually created a corporation,

they must be taken to be such by necessary implication. The hospital was established in 1708, and the 21 & 22 G. 3, c. 13, specially provides that an annual sum shall be paid out of the public moneys for its support. The 5 & 6 G. 3, c. 20, is the general Act applicable to hospitals; and a vacancy having occurred in the office of physician to the hospital, the Governors proceeded to elect one, in conformity with the provisions of that Act. It constitutes the governing bodies of county hospitals a corporation, and prescribes the mode in which elections are to be held. Under the provisions of that Act, a notice was given of the election, and it was accordingly held on the 19th and 20th of January.

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The first question raised at the election was as to the right of members voting by proxy; and it was contended proxies were not available. The number of electors present was twelve; and out of these, eight voted for Doctor Griffin, four for Doctor Gelston. The chairman however received proxies, and there being seven of these received who all voted for Gelston, he was placed in a majority. These proxies resided out of the locality; and one objection made to them was, that by the terms of the notice in the Gazette, testimonials for the office of physician were receivable up to twelve o'clock of the day of the election, and the proxies residing out of the diocese could not of course exercise a judgment on them.—[CRAMPTON, J. This Court decided that proxies were receivable, in the *Case of the Port Stewart Dispensary*.]—That was by virtue of a bye-law of the governing body of that institution; but members of a corporation cannot make a bye-law entitling its members to vote by proxy; and this body must be held to be a corporation: for 21 & 22 G. 3, c. 13, s. 3, provides that the sum thereby payable to the treasurer of the hospital shall be appointed by the Governor and Governesses of the said hospital, to be applied as they shall think advisable; thus designating them by the corporate name given by 5 & 6 G. 3 to hospitals generally. The 2nd section of 5 & 6 G. 3 makes donors of twenty guineas, and subscribers of three guineas, members of the body corporate, and provides a perpetual succession, to be called "The Governors and Governesses of the respective county hospitals in this kingdom." It thus recognises the governing

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body by that name, and its object was to bring all hospitals within its range. The 47 G. 3, sess. 2, c. 50, extends that 5 & 6 G. 3 to counties where no special provision has been made by any Act of Parliament for erecting and establishing infirmaries or hospitals; it extends its provisions to counties of cities and towns; 49 G. 3, c. 36, extends the provisions of 47 G. 3, c. 50, to counties of cities and towns.

Have then this corporation, by the making a bye-law, a right to enable persons to vote by proxy? Dispensaries are not created by statute, but by private benevolence; but the case now before the Court is one of a statutable corporation. A member of a corporation cannot give his assent to any act which is to charge the corporation by proxy: the *Case of The Dean and Chapter of Ferns* (a). Dispensaries are supported by annual subscriptions, and have nothing in them like a corporation. This body being a corporation, they cannot by any bye-law alter the Common Law; and Doctor Griffin, having the majority of votes from those present, is the legally elected officer.

Martley and Joshua Clarke, contra.

It cannot be disputed that corporations have power to make bye-laws, if they be reasonable ones; but it is not necessary to argue that position, for we contend that this body is no corporation at all.

The 5 & 6 G. 3 has a specific object, viz., the erecting hospitals and infirmaries in the several counties of the kingdom, and its application is altogether prospective, not referrible to existing bodies. It deals with but two existing infirmaries, namely, the North and South Infirmaries of Cork, mentioned in section 10; and the 11th section provides that they are to be supported by grand jury presentments, which by section 12 are directed to be applied, by the Governors and Governesses, as they shall think advisable for the benefit of the infirmaries.

But these infirmaries are not thereby constituted corporations; and what is done by that Act for the infirmaries of Cork and Dublin is done for that of Limerick by 21 & 22 G. 3. It has not been

(a) Sir J. Davis' Rep. 119, ed. 1762.

argued by the *Attorney-General* that 47 G. 3 has any operation in rendering them corporations. A local Act for the management of Barrington's Hospital in the city of Limerick, 11 G. 4, c. 72, shows that by the operation of these grants to existing institutions, 5 & 6 G. 3 did not incorporate them. By 13 & 14 G. 3, c. 43, the Meath Hospital in Dublin, which was previously a private infirmary, was created a county hospital, and its governing body a corporation; so 15 & 16 G. 3, c. 31, extends the provisions of 5 & 6 G. 3 to that hospital—clearly evincing that 5 & 6 G. 3 did not render these institutions corporate bodies.—[MOORE, J. Clearly, 5 & 6 G. 3 does not make them corporate bodies.]—If not, then the conditional order must fail, for it is taken out against the defendants as a corporation.

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Deasy replied.

By Governors and Governesses, the Legislature meant the same class of persons as those ruling in existing infirmaries—persons elected for similar purposes; and therefore in 5 & 6 G. 3, it uses a like designation.—[LEFROY, C. J. Suppose the case of a private foundation, created by deed or will, and the instrument creating it specifies certain rules for their guidance.]—That is met by 21 & 22 G. 3. In 47 G. 3, there is no specific mention of these particular bodies, and that omission is a legislative declaration that such had been previously legislated for. No particular form of words is necessary to create a corporation.—[PERRIN, J. It is not a legal objection that a party voted by proxy as a member of the board.—LEFROY, C. J. If the objection be taken because of this body being a corporation, it entirely fails.]

LEFROY, C. J.

We are all of opinion this order should not be made absolute. The ground intended to be relied on for the purpose of making it absolute was, that this being a corporate body, by the general rule of law its members could not vote by proxy. Without deciding whether that might be the result as applicable to this body, we dispose of the case on the ground that it was not a corporation.

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It was argued by the *Attorney-General* that, by necessary implication of the statute, it must be taken to be a corporation, in order to effectuate the several purposes referred to in the statute. No doubt, a corporation may be created without technical words; but when we are called on to create it by implication, the implication must be a necessary one, and such as is absolutely essential to the duties to be performed. On Common Law principles such has always been, from the necessity of the case, as in the case of a Crown grant of land to such persons as churchwardens, or to the "*probi homines* of Dale;" the principle being the necessity of an actual implication to make a corporation for the objects to be attained. What object was here to constitute this body a corporation that could not have been attained without making it one? In the first statute to which we have been referred, they are the subject of a presentment by the grand jury, and they are recognised by an appropriate title; and because in that same Act some private hospitals in Cork and Dublin are mentioned in the same terms for the purpose of administering the moneys so presented, and their ruling bodies are designated as the Governors and Governesses of the hospitals, it is argued that the omission of the Limerick hospital from the Act subjects it to be made a corporation even against their will. As to the Cork and Dublin hospitals, where was the necessity to make them corporations, to enable them to administer their funds? These could be distributed by them in their incorporate, as well as in their corporate, capacity. Although the 21 & 22 G. 3, c. 13, by its title extends the provisions of the former Act, we cannot create a body out of its title. It but purports to give a bounty to a particular hospital, but it did not make corporations. The control of the funds is left in the discretion of the Governors and Governesses; and the two Acts of 13 & 14 G. 3, c. 43, and 15 & 16 G. 3, c. 31, to which Mr. *Clarke* referred, are material, as amounting to a legislative declaration that an hospital, by being made a county hospital, is not thereby created a corporation. But the 6th section of 47 G. 3, c. 50, puts an end to the implication of this body being a corporation. It therefore not being a corporation, the objection as to voting by proxy being illegal will not hold.

CRAMPTON, J.

I concur. This body was not a corporation, and the objection to the voting by proxy has grown out of the assumption that it was; had it been so, the Court would have had to consider whether a bye-law, enabling proxies to vote, was or was not constitutional: that we need not now discuss. In the *Port Stewart case** we certainly decided that such a bye-law was good; however, that was the case of a private body.

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PERRIN, J., and MOORE, J., concurred.

Cause allowed, without costs.

* THE QUEEN, at the Prosecution of HENRY O'HARA,
v.

JOHN CAMPBELL, Secretary and Treasurer of the Ballyaghran Dispensary, in the County of Londonderry, and the Subscribers duly qualified to act in that behalf.

H. T. 1842.
Queen's Bench

IN Michaelmas Term 1841, a rule was obtained for a writ of *mandamus*, directed to the defendants, commanding them to declare Robert Babington duly elected as the medical attendant of the above dispensary. To this *mandamus* the defendants put in a return. It appeared from the statements set forth in the *mandamus* and the return that the dispensary was established in May 1837; that an election was held for a medical attendant thereto on the 19th of April, at Port Stewart, when George Russell was declared to be duly elected as such medical superintendant, he appearing to have the majority of votes in his favour.

A subscriber to a dispensary, being a married woman, whose subscription thereto was paid out of her own moneys, may vote for the appointment of medical officer by her husband as her proxy.

The case was argued in Hilary Term 1842, on the return to the *mandamus*, by *Napier* and *Holmes* for the prosecutor, and *J. Pennefather* and *Tombe* for the defendants. The question raised on the argument was, whether subscribers were empowered to give their votes by proxy under a bye-law made by them to that effect? and also whether a married woman was entitled to vote as a subscriber, she having paid her subscription out of her own proper money? and if so entitled, whether she could appoint a proxy to vote for her? If proxies were inadmissible, the majority of the votes would be in favour of the prosecutor.

BURTON, J., delivered the judgment of the Court.

The Court is of opinion that this *mandamus* ought not to issue. The writ states that at a meeting of the subscribers, George Russell was duly elected by a majority of votes; and the objection to that election is, that among the votes tendered and received, one was given by Olivia, the wife of John Cromie, and that that vote was not given by Mrs. Cromie in person, but by her husband as her proxy. It appears that she was a subscriber, and had paid her subscription out of her own proper money. The objection is—first, that she, being a *feme covert*,

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had no authority to vote as a subscriber. Secondly, assuming she had a right to vote, that she could not depute that right to another. Being a subscriber, I apprehend her vote could not properly be rejected, it being by a bye-law the general right of subscribers to vote by proxy. And although it is, generally speaking, true that a *feme covert* cannot appoint an attorney, yet, when the appointment is made in conjunction with her husband, it may be done. It is so laid down in *Wilson v. Riche* (Yelv. 1); ——— v. *Hopkins* (Cro. Car. 165). But the main question appears to be, whether, by payment of the subscription, she became a subscriber in her own right, and thereby acquired a right of voting? It is to be observed that this right, having been exercised by her husband, is as the execution of a power. It is manifest that the subscribers were not confined to males, for the statute speaks of "person or persons" becoming subscribers, and who become "*governors and governesses*;" this power of subscribing and voting not being given for a private purpose, but for the purpose of executing a public trust. The object of the subscription was for the purpose of providing charitable relief, not for influencing the election; and there is a further provision that it should be made by the proper money of the person subscribing. These guards in the statute are introduced to prevent an occasional subscriber exercising the privilege so as to influence the election. The case is perfectly free from any doubt; and we are of opinion, upon the whole case, that the return is sufficient, and that the election should not be disturbed.

Judgment for the defendants.

BYRNE

v.

THE DUBLIN AND BRAY RAILWAY COMPANY.

April 19.

Where a judgment is obtained against a Railway Company, and execution issued thereon, to which a return of *nulla bona* is made, the plaintiff is entitled to issue a *scire facias* against a shareholder of the Company, under the 36th section of the Companies Clauses Consolidation Act.

PILKINGTON moved for liberty to issue a *scire facias* against William Fitzgibbon, a shareholder of the Dublin and Bray Railway Company. A judgment had been obtained by the plaintiff against the Company in an action for work and labour, and a *fieri facias* had issued thereon, to which the Sheriff had made a return of *nulla bona*. The 36th section of the Companies Clauses Consolidation Act* enables a party to issue an execution against a

of the Company, under the 36th section of the Companies Clauses Consolidation Act.

* 8 Vic. c. 16, s. 36, enacts, "If any execution, either at law or in equity, shall have been issued against the property or effects of the Company, and if there cannot be found sufficient whereon to levy such execution, then such execution

shareholder.—[LEFROY, C. J. Should you not have sold under the seizure before you came here to apply for a *scire facias* ?]—The goods were not sufficient to meet the execution.—[LEFROY, C. J. The legal way of ascertaining that would have been on the Sheriff's return.]—We have the Sheriff's return of *nulla bona* ; a *scire facias* is the only mode of obtaining execution against a shareholder : *Hichins v. The Kilkenny Railway Company* (a) ; *Clowes v. Brettell* (b) ; *Wingfield v. Barton* (c) ; *Eardly v. Law* (d).

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 AND
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 RAILWAY
 COMPANY.

Fitzgibbon, contra.

There is no evidence of the defendant being a shareholder ; he is returned on the registry as a shareholder, but that is only *prima facie* evidence against him. This is a collusive proceeding.—[MOORE, J. *Prima facie* evidence is sufficient to entitle a party to proceed.—LEFROY, C. J. This defence is open to you on a plea ; it is no answer to this motion.]

Per Curiam.—Take the order.

(a) 1 L. M. & P. 713 ; S. C. 5 Ex. Rep. 834.

(b) 10 M. & W. 506.

(c) 2 Dow, N. S. 355.

(d) 12 A. & E. 802.

may be issued against any of the shareholders to the extent of their shares respectively in the capital of the Company not then paid up : Provided always, that no such execution shall issue against any shareholder except upon an order of the Court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open Court, after sufficient notice in writing to the persons sought to be charged ; and upon such motion such Court may order execution to issue accordingly ; and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee."

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Queen's Bench

ELIZABETH M. DAWSON, Executrix of
 Reverend JOHN DAWSON, v. ANNE NASH.

April 20, 24.

To a plea of the Statute of Limitations the plaintiff replied that the testator, after the passing of the Process and Practice Act, had, in respect to the same causes of action as in the declaration mentioned, sued out a writ of summons against the defendant, and that within four months from the date of the writ, and whilst the suit was pending, and within six years next before its commencement, the testator died, and thereupon the suit was abated; that the plaintiff, as executrix, within a reasonable time after the death of the testator, sued out against the defendant another writ of summons with the intent that the defendant might appear, and the plaintiff declare against the defendant; that the defendant appeared, and plaintiff declared for the same causes of action which accrued to testator within six years before the commencement of the suit. To this the defendant rejoined the non-service of the writ, or any appearance entered. *Held*, that such rejoinder was bad, as the replication alleged matter sufficient to bring the case within the saving of the Statute of Limitations.

ASSUMPSIT.—The declaration stated that the Rev. J. Dawson, in his lifetime, to wit, on the *24th day of March*, A.D. 1845, to wit, at &c., made his bill of exchange, and directed same to the defendant, and thereby required the defendant to pay to the said John Dawson £50 three months after the date thereof, which period elapsed before the commencement of this suit, and the defendant then and there accepted the said bill, and promised the said J. D. in his lifetime to pay the same, but did not pay the same when due.

The second count was on an acceptance of the defendant, made on the *20th of September* 1848; and the third count was the consolidated money count, alleging the defendant being indebted to J. D. on the 12th day of January 1850.

Pleas—First, *non assumpsit*; and secondly, to the first count—*Actionem non*; “Because she says that the said supposed causes of action in the said first count of the said declaration mentioned did not, nor did any or either of them, accrue at any time within six years next before the commencement of this suit, in manner or form,” &c.

Replication—*Similiter* to first plea; and to the second—

Precludi non; “Because she saith that heretofore, and in the lifetime of the said J. D. (deceased), and after the passing of a certain Act of Parliament passed in the Session of Parliament holden in the 13th and 14th years of the reign of her present Majesty Queen Victoria, and entitled ‘An Act for the Regulation of Process and Practice in the Superior Courts of Common Law in Ireland,’ to

“ wit, on the 10th day of February, A.D. 1851, to wit, at Dublin, in
 “ the county of the city aforesaid, the said defendant being indebted
 “ to the said J. D. (deceased), in respect of the said several causes of
 “ action in the said first count of the said declaration mentioned,
 “ the said J. D., for and in respect of the said identical causes of
 “ action in the said first count of the said declaration mentioned,
 “ sued and prosecuted out of the Court of our said Lady the Queen
 “ a certain writ called a writ of summons, bearing date the day and
 “ year last aforesaid, directed to the defendant, whereby our said
 “ Lady the Queen commanded the said defendant, therein described
 “ of Carne House, in the county of Mayo, widow, that within eight
 “ days after the service of the said writ upon her, exclusive of the
 “ day of such service, she should cause an appearance to be entered
 “ for her in her said Majesty’s Court of Exchequer at Dublin, in an
 “ action of debt at the suit of the said J. D. (deceased); and that
 “ she should take notice that in default of her so doing, the said J. D.
 “ might cause an appearance to be entered for her, and proceed
 “ thereon to judgment and execution; which said writ bore date on
 “ the day on which same was issued, to wit, on the day and year
 “ aforesaid, and was sealed with the seal of her said Majesty’s Supe-
 “ rior Courts of Common Law at Dublin, and was subscribed with
 “ the name and place of abode of Thomas Mostyn, the attorney
 “ issuing the same; and on the said writ was indorsed a memo-
 “ randum, that the same was to be served within four calendar
 “ months from the date thereof, including the day of such date, and
 “ not afterwards; which said writ was so sued out and prosecuted
 “ as aforesaid out of the said Court by the said J. D., with intent
 “ that the said defendant might, by virtue thereof, appear in the said
 “ Court to answer him in the said action, and that the said J. D. might
 “ thereupon declare against her the said defendant, upon and for the
 “ said several causes of action in the said first count of the said de-
 “ claration in this suit above-mentioned.

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“ And the said plaintiff, executrix as aforesaid, further saith that
 “ within four calendar months from the date of the said writ, and
 “ whilst the said suit was pending and undetermined, and within
 “ six years next before the commencement of the suit of the plaintiff

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“ as executrix as aforesaid against the said defendant, to wit, on the
 “ 14th day of February, A.D. 1851, to wit, at &c., the said J. D. died,
 “ and thereupon the said suit of the said J. D. was thereby then and
 “ there abated, and the said proceedings thereon ceased, and was and
 “ is wholly determined and ended, to wit, at &c.

“ And the plaintiff, executrix as aforesaid, further saith that she,
 “ the plaintiff, as executrix aforesaid, afterwards, and within a reason-
 “ able time next after the death of the said J. D., that is to say, within
 “ a year after his death, to wit, on the 15th day of August, A.D. 1851,
 “ to wit, at &c., for the recovery of the damages sustained by her as
 “ executrix as aforesaid, by reason of the non-performance of the said
 “ promise in the said first count of the said declaration in the action
 “ above-mentioned, sued and prosecuted out of the Court of our said
 “ Lady the Queen, before the Queen herself at Dublin, a certain
 “ other writ called a writ of summons, bearing date the day and year
 “ last aforesaid, directed to the defendant, whereby, &c. (setting out
 “ the writ as before); which said last mentioned writ was so sued
 “ out and prosecuted, as aforesaid, out of the said Court by the said
 “ plaintiff as executrix as aforesaid, with intent that the said defend-
 “ ant might by virtue thereof appear in the said Court to answer
 “ her in the said action; and that thereupon the said plaintiff, as
 “ executrix as aforesaid, might declare against the said defendant
 “ upon and for the said several causes of action in the said first
 “ count of the said declaration in the suit above-mentioned. And
 “ the plaintiff, executrix as aforesaid, further saith, that afterwards,
 “ to wit, on the 20th day of October, A.D. 1851, the defendant
 “ appeared in the said last mentioned action, according to the said
 “ last mentioned writ; and that the plaintiff, as executrix as aforesaid,
 “ according to her said intent, by Thomas Mostyn her attorney,
 “ afterwards, to wit, on the 7th of November, A.D. 1851, declared
 “ against the defendant in manner and form aforesaid. And the
 “ said plaintiff, executrix as aforesaid, avers that the said several
 “ causes of action, in the said first count of the said declaration in
 “ this suit mentioned, did accrue to the said J. D. within six years
 “ next before the suing out of the said first mentioned writ by the
 “ said J. D. as aforesaid.”—*Verification.*

Rejoinder—*Actionem non* ; Because she saith that although true it is the writ of summons in said replication mentioned was sued and prosecuted out of the said Court in said replication mentioned, yet for rejoinder in this behalf the said defendant saith the said writ of summons was not, nor was any duplicate, or any copy thereof, ever served upon the defendant or any person for her, nor was any appearance either by the defendant or by the plaintiff for her, or by any person, ever entered or made on behalf or in the name of the defendant to the said writ of summons.—*Verification*.

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Special demurrer—That the rejoinder is no answer to the replication ; that it is evasive and argumentative, and that no certain or sufficient issue could be taken thereon, and that the defendant had not confessed and avoided, or traversed and denied, the replication of the plaintiff, to which the rejoinder was pleaded, but had offered an issue upon a collateral, immaterial and foreign point ; and that the defendant had not traversed, or attempted to put in issue, any matter of fact alleged by the plaintiff, but had put in issue matters of fact not alleged, or necessary to be alleged.

Joinder in demurrer.

Sheckleton and J. Robinson, for the demurrer.

If a party entitled to sue die before the Statute of Limitations interpose, his executor is entitled to bring an action on the testator's contract within a year after the death of the testator. 1 *Tidd Prac.*, 9th ed., p. 28 :—" If an executor take out proper process *in assump-*
" *sit* within a year after the death of his testator, the six years not
" being elapsed before, though they expire within that period, yet it
" will be sufficient to take the case out of the statute." *Buller's*
N. P., p. 150 :—" If an executor take out proper process within a
" year after the death of his testator, if the six years were not lapsed
" before the death of the testator, though they be lapsed within that
" year, yet it will be sufficient to take it out of 21 *Jac.* 1, c. 16, by
" the equity of section 4." The Statute of Limitations was passed for the ease of defendants, and hence it became necessary for plaintiffs to enter continuances, if the defendants could not be served. Again, if an action be commenced by a testator in his lifetime,

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and the six years subsequently expire, his executor may bring a fresh action, provided he do it within a reasonable time : 1 *Tidd Prac.*, p. 28. Our replication alleges this action was brought within a reasonable time after the death.

Is then the issuing a writ of summons sufficient to save the bar of the Statute of Limitations? In *Braithwaite v. Lord Mountford* (a), it was held that, where a writ of summons, tested in time to save the Statute of Limitations, was re-sealed in consequence of an alteration in the description of the defendant, and the county in which he resided, and was not served until the six years had expired, that the re-sealing did not amount to a re-issuing of the writ, and that it was not necessary to show when the re-sealing took place : *Alston v. Underhill* (b). In that case Bayley, B., says :—"There is no doubt the suing out the summons is the commencement of the suit for every purpose." *Lord Middleton v. Forbes* (c), in the note to *Karver v. James*, decides that an action by original, brought by an administratrix within six years after the cause of action accrued, would enable the administratrix and her husband (whom she afterwards married) to recover in an action by bill by both, notwithstanding a plea of the Statute of Limitations : *Kinsey v. Heyward* (d). The commencement of an action within the time limited by the statute is an answer to the plea of the statute, though such action abated by the act of God, if the action was commenced within a reasonable time after the abatement. A year is a reasonable time.

Lawless, in support of the rejoinder.

There is no question raised as to what is reasonable time ; what we contend for is, that an executor is not entitled to a reasonable time after the decease of the testator, when the action has not been begun by the testator, for the Statute of Limitations is not prevented running until a writ has been served or returned.

The replication is bad on demurrer, for not showing any return or service of the writ of the 10th of February 1851 ; and the re-

(a) 2 Cr. & Mees. 408.

(b) 1 Cr. & Mees. 493.

(c) Willes Rep. 259.

(d) 1 Ld. Ray. 432.

joinder to it is not immaterial, because the mere issuing of the writ without service is not sufficient. The plaintiff must contend that the issuing of the writ without service or appearance or return is sufficient, or that reasonable time exists for the executor, or that it exists after the writ issued. The Limitation Statutes are 10 *Car.* 1, sess. 2, c. 6 (*Ir.*), and 21 *Jac.* 1, c. 16 (*Eng.*), and the 14th section of the former, and the 3rd section of the latter, require the action to be commenced within six years, and not after. By the 15th section of 10 *Car.* 1, analogous to the 14th section of 21 *Jac.* 1, it is provided, if judgment be given for the plaintiff, and reversed for error, or verdict for the plaintiff, and on matter alleged in arrest of judgment, the judgment be given against plaintiff that he take nothing by his bill, &c.; or if the action be by original, and defendant be outlawed, and after reverse the outlawry, in all such cases the plaintiff, his executors or administrators, may commence a new action within a year after judgment reversed or given against the plaintiff, or outlawry reversed, and not after.—[MOORE, J. The Courts introduced a peculiar equity under that section, not exactly within its terms.]—The 17th section 10 *Car.* 1, and the 7th section of 21 *Jac.* 1, exempt infants, *femes covertes*, persons imprisoned, or beyond seas, from the general provisions of the statute, and give them liberty to bring their action within such time after the disability ceases as other persons would have had; but these are the sole exceptions. In 2 *Wms. Saund.*, p. 63 *g*, note, it is laid down that “To the plea “of the statute the plaintiff may reply a *latitat* or *capias* sued out “within time, and returned *non est inventus* by the Sheriff, and “show that the process was regularly continued by *vicecomes non* “*misit breve* to the time of declaring: *Budd v. Berkenhead* (a). “If the *latitat* be returned the continuances may be entered at any time.” The plaintiff must show that the writ was returned: *Harris v. Woolford* (b): *Brown v. Babbington* (c). In that case Holt, C. J. says:—“Here was a fatal fault, viz., that plaintiff “does not show that the original was ever returned; now if he

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(a) 2 Salk. 420.

(b) 6 T. R. 617.

(c) 2 Ld. Ray. 880.

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So in *Kinsey v. Heyward* (a), where the plea was *non assumpsit infra sex annos*, replication, that plaintiff's testator sued out a writ of *quare clausum fregit*, on which he intended to declare against defendant's testator; that defendant's testator died, and plaintiff's testator sued out another writ against defendant; that plaintiff's testator died, and plaintiff then sued out the writ: Treby, C. J., says, "This writ is not maintainable by journeys accounts, because "the plaintiff was not the same person; and secondly, because the "former writ ought to be continuing in Court and returned. The "action being sued within six years, it is excepted out of the "statute, and the party is at liberty to continue that action, or to "commence another within a period not forbidden by the statute. "But he ought to be limited to some reasonable time. Therefore if "a writ be brought within six years, although it be discontinued by "death, &c., and the six years expire, yet the Statute of Limitations "shall not be a bar if another be commenced in a reasonable time, "and a year is a reasonable time. The discontinuance or failing of "any of the process shall not be intended, but must be shown." There was judgment for the plaintiff in that case, but error was assigned, because the continuances of the writ were not pleaded, and it was not said that the writ was undetermined. *Attwood v. Burr* (b) also shows the writ must be returned, and that no proceedings can be had on a writ not returned. The statute once beginning to run, no interruption will stop it: *Rhodes v. Smethurst* (c); same case in Error (d). *Wilcocks v. Huggins* (e) shows within what time an executor must pursue an action begun by his testator: *Townsend v. Deacon* (f). As to the principle of an executor having reasonable time after the death of his testator to sue, that only applies to cases where a suit has been instituted and has been promoted to some extent: *Karver v. James* (g). That was an action on promises to

(a) 1 Lord Ray. 432.

(b) 7 Mod. 5.

(c) 4 M. & W. 42.

(d) 6 M. & W. 351.

(e) 2 Str. 907.

(f) 3 Exch. 706.

(g) Willes, 255.

plaintiff's testator, and the plea was the Statute of Limitations—
 Replication, that a writ had been sued out, and several writs sued
 out; that the Sheriff had never returned these, or done any thing
 with them; but before the return of the last writ the testator died
 recently, after whose death plaintiff sued out *capias*, and special
 demurrer that the writ first sued out was void for want of return.
 Willes, C. J., said, it sufficiently appeared that the action was by
 plaintiff as executor; that the replication should have shown the
 first writ returned; and referring to *Kinsey v. Heywood*, that the
 decision in the House of Lords in that case was, that the replication
 should show the writ delivered to the Sheriff, and return of it; that
 the practice is to return *non est inventus*, and then continue the
 writ by *vicecomes non misit breve*; that it would be greatly incon-
 venient if plaintiff could sue out a writ and keep it in his pocket
 for six years together, of which the defendant could not possibly
 have any notion. If the plaintiff rely on process to prevent the bar
 of the statute, he must show its requisites complied with: *Higgs v.*
Mortimer (a).

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Robinson replied.



Cur. ad. vult.

LEFROY, C. J.

This case comes before the Court on a demurrer to a rejoinder,
 and the cause of the demurrer is that the issue tendered by the
 rejoinder is an immaterial issue. That demurrer raises a question
 on the replication; for if the matter be material, it would show
 that the replication is bad on general demurrer, for the omission
 of that matter; so that in fact the question is as to the sufficiency of
 the replication.

April 24.

The action was brought by the plaintiff, as executrix of John
 Dawson, against the defendant, as acceptor of a bill of exchange,
 drawn by J. Dawson in his lifetime and accepted by the defendant.
 To this the defendant has pleaded, that the cause of action did
 not accrue within six years next before the commencement of this

(a) 1 Exch. 711.

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suit; the plaintiff has replied that a writ of summons was issued in the lifetime of John Dawson, her testator, for the same cause of action, and that pending that suit, and within six years next before the commencement of this suit of the plaintiff, John Dawson died in the month of February, and that within a reasonable time, in the month of August following, the plaintiff issued the present writ as executrix, upon which a declaration was filed, and the subsequent proceedings have taken place. To that replication a rejoinder has been put in, alleging that the writ so issued never was served upon the defendant, nor was any appearance entered thereon. The demurrer admits the facts in the rejoinder, but alleges they are immaterial; the question therefore is, whether the issuing of a writ of summons before the Statute of Limitations attaches, and the party dies without having served that writ, and his representative issues a new writ within a reasonable time, whether that takes the case out of the Statute of Limitations; or in other words, is it a good replication to a plea of the Statute of Limitations?

The first question is, what is meant by the word "suit?" what is the commencement referred to by this plea? Generally speaking, it means a pending suit, and refers to the commencement of the very suit in which the plea is filed. But the law allows in some instances the issuing of a writ at an antecedent period to be available to take the case out of the statute, if connected with the proceedings that are pending; this is done by continuances. It also allows a case to be taken out of the statute by the issuing a substantive writ unconnected with the pending proceedings. There is also a third case specified in the statute, where the first writ became unproductive in consequence of the judgment being arrested, or upon a proceeding in outlawry or reversal of proceedings by error; in that case the statute provides that the party may have a new writ in consequence of the former being unavailable. There is also a fourth case, which is held to be within the equity of the statute, that is, where a testator or intestate, having issued a writ before the statute attached, dies, his representative is entitled, within a reasonable time, to issue a new writ for the same cause of action, and thus take the

case out of the operation of the statute. A reasonable time has, by analogy, been held to be within a year.

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The rejoinder here admits the death of the testator, pending the writ of summons which was issued by him in his lifetime, and the fact of his death within four months after the issuing of that writ; but it alleges that writ was never served, nor was any appearance entered on it; and the question then is, whether that writ so issued, without service, takes the case out of the statute?

It was argued on the part of the plaintiff that the mere death of the party within six years would entitle his personal representative to issue a writ in order to avoid the statute, though the six years be lapsed within that year. That argument was founded on a passage in *Buller Nisi Prius*, p. 150, grounded on a mistaken notion of *Karver v. James* (a); but in that case the death of the testator is stated, and that a writ had been issued in his lifetime. It does not warrant in any degree the inference drawn from it; nor is there any case to be found impugning the doctrine, that when once the Statute of Limitations has begun to run, it continues to run, unless a writ be issued in the lifetime of the testator.

The question really is, whether a writ of summons having issued, without being served, or an appearance entered, is sufficient? I cannot find any case in which under the old form of process it was held necessary to aver the service of the process, or that an appearance had been entered. There are cases where the process was issued and kept in the pocket of the party, in which it was held to be insufficient to take the case out of the statute; but in those cases the writ was issued at such a distant period that the subsequent writ could not be held to have been issued within a reasonable time of the former writ. There also, attempts were made to connect them by continuances. But in those cases where it is said you cannot have continuances entered on a writ not returned, it was to show how unreasonable it would be that a party not having his writ returned, his representatives, upon a writ issued five years after his death, should come forward and enter continuances and take a case out of the statute, contrary to the rule which requires a second writ to be

(a) Willes, 255.

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issued within a reasonable time after his decease. These cases therefore do not conflict with the rule that a writ issued, though not served or returned, will take the case out of the statute, provided the personal representative issued within a reasonable time a new writ. There was no need of any continuances. Here there could not have been any, for the writ does not go to the Sheriff; and if it were to be upheld by continuances, it has a sort of statutory continuance for four months from its issuing, during which period the testator dies, and within a reasonable time after the new writ issues. There would be no reason whatever for the service of the writ, inasmuch as no continuances could have been entered upon it; and in the cases which have been adverted to, the reason for having the writ served or returned was for the purpose of enabling the party to enter continuances.

For these reasons, we are of opinion that the demurrer to the rejoinder should be allowed.

Judgment for the plaintiff.

In re Rev. S. THOMPSON.

April 23.

Where, on an application to a grand jury for compensation for malicious injury, the grand jury are not satisfied that the injury was malicious, the applicant is entitled to apply to this Court for an issue to try the fact.

HANS HAMILTON, on behalf of Rev. S. Thompson, applied for an order directed to the grand jury of the county of Dublin, that they present a sum of £200 for the malicious burning of certain premises belonging to Mr. Thompson. This application is grounded on 7 & 8 Vic. c. 106.

The presentment was duly made at presentment sessions; and the rate-payers then present, feeling a doubt on the evidence as to the burning being malicious, indorsed on the back of the presentment:—
 “The service of proper notices was proved; but we cannot say
 “whether the burning was malicious or not, as we have no juris-
 “diction to examine on oath.”

By 7 & 8 *Vic.* c. 106, after a malicious burning, the presentment goes before the next presenting sessions, who are to examine the notices served, and hear the merits, and their chairman is to indorse their opinion. It thus goes before the grand jury; and accordingly this case was by them heard on the 21st of April, who also expressed doubts as to the evidence being sufficient to prove the burning a malicious one. The 125th section of the statute provides the remedy if the grand jury reject the application—it enacts, that all applications for compensation for loss or damage sustained by malicious injury shall be laid before the Judges of the Court of Queen's Bench; and in case any person, whose application for compensation shall be disallowed by the grand jury, shall wish to have his application re-considered, he shall be heard; and the Judges, if they shall think fit, shall direct a jury to be empanelled to try the matter of such application.

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We say it is a fit one to be submitted to a petty jury. This Court has therefore a discretion.

[The application was grounded on an affidavit, setting out the circumstances of suspicion on which Mr. Thompson rested.]

LEFROY, C. J.

Take the order, and let notice of trial for the 5th of May be served on the grand jury.

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May 6, 7.

An ejectment on the title was brought by an owner in fee against a lessee, who had held certain lands, *pur auter vie*, which he had sublet to undertenants from year to year. On the determination of the life, it appeared that some of the undertenants had cropped the lands—others had not; and at the time of bringing the ejectment, the current year of the under-tenancy had not expired. The undertenants suffered judgment by

EJECTMENT ON THE TITLE, tried before Howley (Serjeant), at the Spring Assizes of 1852, for the county of Waterford.

It appeared from the evidence that the ejectment was brought for the recovery of the lands of Graignagour, held under a lease for the life of one John Tobin, at a rent payable on the 1st of May and the 1st of November. Tobin died on the 26th of November 1851, and the summons in ejectment was served on the 29th, on the defendant Mulcahy, who was not in possession of the lands, and on the occupying tenants. Mulcahy took defence for all the lands; but the tenants in possession, who held under Mulcahy at rack-rents, allowed judgment by default to be marked against them. Some of these tenants had sown wheat and oats in the land prior to the death of Tobin, others not until after his decease; and the land of others was in grass.

On this state of facts, Counsel for the defendant called for a non-suit, on the ground that by the operation of the statute 14 & 15 Vic. c. 25,* the tenancy continued until the next gale day. The learned

defendant *pur auter vie* not being in occupation, having taken defence generally, relied on the 14 & 15 Vic. c. 25, giving to tenants an extended term until the expiration of the current year of their tenancy, if the tenancy determine by death or cesser of the estate of a landlord entitled for life. *Held*, that the tenant *pur auter vie* had no right to set up that defence, as he had no claim to emblements, and the undertenants, having suffered judgment to go by default, had thereby ended their title, and therefore that the owner of the land was entitled to recover possession.—[PERRIN, J., *dubitante*.]

Quære.—Whether 14 & 15 Vic. c. 25, applies to tenants not entitled to emblements?

* 14 & 15 Vic. c. 25, s. 1, after reciting that it is expedient to amend the law to prevent or lessen the evils of the right to emblements, and the loss and injury arising therefrom, and also the law relating to growing crops, &c., enacts, "That where the lease or tenancy of any farm or lands held by a tenant at rack-rent shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit, upon the terms of his lease

Judge refused to nonsuit, but directed the jury to find a verdict for the plaintiff as to all the lands; reserving liberty to the defendant to have a verdict entered for him if the Court should be of opinion, according to the true construction of the statute, and the facts as proved, he should have so directed the jury; and also reserving leave to the plaintiff to move to have a verdict entered for him as to such parts of the land as were not cropped before the death of Tobin. An order *nisi* having been obtained to set aside this verdict—

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Rollestone (with him *Harris*) showed cause.

The question sought to be raised upon the statute does not arise in the present case. The statute is confined to cases between the immediate landlord and his tenant, and cannot be extended to parties with whom the head-landlord is in no privity; the tenant is to occupy to the end of the current year of his tenancy—that cannot apply to the occupying tenants here, as they hold under a different tenancy from that under which the defendant held.

The Act is but a statutable substitution for emblements. But a portion of the lands was not cropped; and for that we are at least entitled to hold the verdict, as defence has been taken generally.

D. Lynch and *Wall*, contra.

These lands were not in the actual occupation of Mulcahy, but in the possession of tenants holding at rack-rents. The right to

or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time, or other lawful means, during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done if he had been living, or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor, to the time of the tenant so quitting; and the succeeding landlord or owner and the tenant respectively shall, as between themselves, and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions and restrictions, to which the preceding landlord or lessor, and such tenant respectively, would have been entitled and subject, in case the lease or tenancy had determined in manner aforesaid, at the expiration of such current year. Provided always that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid."

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emblements is founded on this—that those who crop should reap. The statute has made a restriction generally, and that in favour of landlords. The section constituted the plaintiff landlord of the occupying tenants immediately on the expiration of the lease, for it speaks of the succeeding owner or landlord—which position the plaintiff fills.—[MOORE, J. The object of the statute was to give to the person entitled to the emblements the privilege of holding possession.—PERRIN, J. Mulcahy has no estate, and the other tenants have let judgment go by default—how then can he set up this privilege?—]—The statute applies to intermediate tenants, and Mulcahy had a right to defend their interests. A landlord must recover on the strength of his own title; and the question is, had he a right of entry when this ejectment was brought?

Harris replied.

LEFROY, C. J.

May 7.

This is an action of ejectment on the title, brought by the head-landlord against his immediate tenant, to recover the possession of premises upon the expiration of a lease for one life under which the tenant held. At the time the lease expired, undertenants of the lessee were in actual possession of the lands; and the defence is, that they had a right to emblements, and therefore under the statute 15 Vic. c. 25, they were entitled to the possession until the expiration of the current year.

For the present, I assume they had given evidence of that right. The life in the lease dropped on the 26th of November 1851. Had the statute not then been passed, upon the fall of this life the head landlord would have been entitled to recover possession, as on an expired lease, not only against his immediate tenant, but also against the occupying tenants, and the middleman never could have set up an outstanding term in his own tenants. He held but for one life; that interest had expired, and it is impossible he could give them a continuing tenancy against his own head-landlord. They would be entitled to emblements, but that would not give them possession for an hour longer than their immediate landlord.

But it is now argued that by virtue of the statute the middleman is entitled to set up an outstanding interest in the occupying tenants and, as their protector, to defeat the landlord's right against himself. The undertenants were all made parties to this ejectment, and judgment has been obtained against them by default, and the question is not as between them and the head-landlord, whether they would have the protection of this statute, but whether the middleman can set up this case to defeat his own landlord? So to hold would be nullifying one of the most important provisions of the statute, for the result would be to enable the middleman to defeat the head-landlord, and thereby put the latter out of the position of being landlord over the occupying tenants, and thus do away with one of the objects of the statute—namely, the creating of a tenancy between the head-landlord and the undertenants, for the middleman would have on record one continuing title, and as between him and the undertenants there would be an existing tenancy.

The statute gives no right to a party not having a claim to emblements, but it was intended to secure to the occupying tenants possession of the land, in order to realise their crops; it was never intended that a middleman should avail himself of it. He comes neither within its letter or its spirit.

This statute may, however, be carried out without encroaching on the landlord's right to recover the possession. The 9 & 10 Vic. c. 111, provides, that where a landlord obtains an *habere* he may enter into an arrangement with the occupying tenants to give them time to remove their crops, and may postpone the benefit of his *habere*. He may use it for the purpose of effecting an attornment, and at the same time reserve to himself the right of recovering possession from the tenants in occupation, if the terms of the attornment be evaded. In this case the landlord may obtain his *habere*, but he need not enforce it to the injury of the undertenants, and prevent them removing their emblements; whereas, if we allowed the middleman to defeat his landlord, we would deprive the tenants of the beneficial use of the lands, and thereby enable the middleman to render nugatory all the provisions of this beneficial enact-

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ment I have referred to. The opinion I have expressed is founded on the assumption that the undertenants were entitled to emblements ; but I express no opinion as to whether a party, not entitled at Common Law to emblements, would, under this statute, be entitled to this extended term. As between the landlord and undertenants, we decide nothing ; what we decide is, that the middleman cannot set up this defence to defeat this ejectment.

CRAMPTON, J.

I agree with my LORD CHIEF JUSTICE. If the undertenants had been the defendants, the plaintiff could not recover, for a statutable term has been created in these persons, to protect whose interest this Act was passed ; but the case of the defendant, who is a perfect stranger, is entirely different from that of the undertenants. The defendant was not in possession of any portion of the land. The plaintiff is the head-landlord, and the defendant had an estate determinable on a life now expired ; he had undertenants, tenants from year to year, who would have been, before the statute, entitled to emblements.

Two questions arise in this case. The first is upon the construction of this statute (14 & 15 Vic. c. 25). It was passed for the protection of tenants, and also to put an end to disputes between landlord and tenant. It was intended to do away with the claim for emblements on the tenant's part, and instead thereof to continue the tenancy of the party entitled to the emblements for a period to be measured by the time to elapse from the termination of the interest to the end of the current year of the tenancy. The new landlord or owner, coming in on the expiration of the tenant's interest, and becoming entitled to the land, is placed in the position of landlord for that intervening period : there was plainly thus an extended term ; one to have the land for that period, and the other to receive a portion of the rent. In a case between a landlord and a single tenant there could arise no difficulty. If the lease expired, and there be no claim for emblements, there is an end to the privity between them. But whatever be the character of the

person who becomes entitled to the land, that person is brought into the position of landlord for that limited period, and the undertenants are made tenants to that new landlord, paying a proportion of the rent. Here the tenants are no longer the defendant's tenants, their tenancy is a mere statutable one, requiring no notice to quit.

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But another question arises, whether, there being something like an outstanding estate in contemplation of law, the party taking defence is at liberty to set up that outstanding estate—an outstanding estate in these persons who are his own tenants? The middleman, as soon as his lease expired, was bound to give possession to his landlord; that landlord would be subject to the rights of these persons, but with them the defendant had no connexion; all privity between them and him had ceased; he was an entire stranger to the land, and thenceforward possession by him would be that of a trespasser.

It is said, however, that he defended the rights of others; but they had suffered judgment to go by default, and so there was an end to their title. Suppose they had been defendants at the trial, and they had then said, we make no claim, could it be argued that Mulcahy could set up a claim in their right, he being a stranger and a trespasser? What then is this extended term? Is it to take place in every case where the undertenants might have emblements? No; it is only where there is a claim for emblements. Here there is no claim, for the undertenants have relinquished all claim. The words of the statute show that the extension of the term is in lieu of claims for emblements.

Admitting, as I do, that a landlord must recover on the strength of his own title, I think he does so here; there is no adverse outstanding title, nothing but a claim at the election of the undertenants; and if he does not elect, no other person can set that claim up, or otherwise interfere.

PERRIN, J.

I concur in the opinion that, if the tenants had been the defendants in this ejectment, the plaintiff could not have succeeded; but

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though Mulcahy has no title, I doubt if we can hold that the plaintiff is entitled to recover, when there is possession either in Mulcahy or a good title under him. Some of these tenants held at a rack-rent as tenants from year to year, that is, provided Mulcahy's interest so long lasted. When Mulcahy's estate ceased, and the case came within the words of the statute, by cesser of his estate their tenancy was at an end. It strikes me that the words of the statute immediately cast upon the tenant in lieu of his claim for emblements a continuing tenancy. I do not think that depends on the right to emblements, and it would lead to inconvenience to hold that the construction of the statute depends on the circumstances of each case, whether or not they were emblements. The object of the statute was to put an end to the continued litigation between landlord and tenant on the subject of emblements. The tenant became entitled to hold and occupy his land until the expiration of the current year, as if it had determined by effluxion of time. Mulcahy had no right to take defence, and the plaintiff's title to bring the ejectment did not accrue upon the cesser of the estate, or on the death of the *cestui que vie*. If the tenants had attorned or surrendered to the plaintiff, I would then adopt the view of the Court; but Mulcahy does not set up a title paramount against the lessors, and there is nothing to prevent him to set up a title that a new lease had been granted to another, if a new holding were granted by the Act of Parliament. There is now an end of the title of the under-tenants by the consent for judgment; but the question is, was it so at the time of the bringing of the ejectment? Upon ordinary principles, a lessor must recover upon the strength of his own title; but I cannot come to the conclusion, for that reason, that the plaintiff here is entitled to recover: but if, as suggested, the judgment marked relates back to the day of the demise, that removes the difficulty.

MOORE, J.

I do not impugn the rule that the landlord must stand or fall by his own title; but had he a title at the time of the bringing of this ejectment? All the parties in possession were served with the

ejectment. Mulcahy had no title or possession ; if any person had title it was the undertenants. They disclaimed title, and allowed judgment to go against them, and that related back to the day of issuing the summons in ejectment, so that there was no outstanding title on the day the ejectment was brought ; and therefore the rule of law, alluded to by my Brother PERRIN, does not apply.

I am clearly of opinion that the undertenants, when a lease determines, are entitled to the benefit given by the statute, and that the present case comes within it ; but I do entertain strong doubts whether any person can claim the benefit of the extended term who has not a claim to emblements.

Cause allowed, with costs.

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STRAD-
BROOKE

v.
MULCAHY.

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Exchequer.

THE QUEEN v. NORREYS.

(Exchequer.)

Jan. 17, 19.

An annuity was granted to M. F. for his life, payable out of the consolidated fund. He by deed assigned said annuity for value to D. J., to hold to D. J., his heirs, executors, administrators and assigns, for the life of M. F. (On the death of D. J. intestate in 1813, the said annuity was treated as personalty, and divided in equal shares amongst the next-of-kin. Held, that the legacy duty did not attach upon this annuity under the provisions of the Stamp Act, 54 G. 3, c. 92.

THIS was a motion made on behalf of the Commissioners of Inland Revenue, to make absolute a conditional rule obtained by them, calling upon Sir Denham Jephson Norreys, Bart., administrator *de bonis non* of Denham Jephson, deceased, to show cause why he as such administrator should not deliver an account upon oath to the said Commissioners of all the property of the said Denham Jephson, deceased, paid or to be paid, or administered, by him the said Sir D. Norreys as administrator as aforesaid, and why the duties thereon had not been paid, or should not not be paid, according to law.

It appeared that in the year 1803 an annuity, payable out of the Consolidated Fund, had been granted to Mathew Franks, Deputy Guardian and Keeper of the Rolls, under the provisions of an Act passed in the 40th year of G. 3 (*Ir.*), as compensation for the loss of his situation, which he ceased to hold on the occasion of the legislative union between Great Britain and Ireland. The annuity amounted to £725, and was granted to M. Franks for the term of his own life.

By indenture of assignment bearing date the 5th of January 1811, and made between the said Mathew Franks of the one part, and Denham Jephson of the other part, the said M. Franks, in consideration of the sum of £6000, "granted and assigned unto the said "Denham Jephson, his heirs, executors, administrators and assigns, "the said annuity of £725, to hold unto the said Denham Jephson, "his heirs, executors, administrators and assigns, for and during the "life of the said M. Franks, for the proper use and benefit of him "the said Denham Jephson, his heirs, executors, administrators and "assigns," &c.

Denham Jephson died intestate in the month of May 1813, leaving his cousin Lieutenant-Colonel William Jephson (the defendant's father) his heir-at-law, and also leaving the said Colonel W. Jephson and six other cousins his next-of-kin. Colonel W. Jephson died in the month of October 1813, at Falmouth, on his way to Ireland from Nova Scotia, where he had been since the death of Denham Jephson, leaving the present defendant Sir Denham Jephson Norreys (then an infant) his heir-at-law; and upon his death, letters of administration of the estate and effects of Denham Jephson, deceased, were granted out of the Prerogative Court to Sir John Aubrey, Philipa Waterhouse, and the Honorable Mary Anne Smythe; and upon the decease of the survivor of them in 1826, letters of administration *de bonis non* of the estate of the said D. Jephson were granted to the defendant.

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Upon the death of Denham Jephson in 1813, the annuity of £725 was dealt with as personal property, and divided among his next-of-kin in seven shares; the heir-at-law (Colonel W. Jephson) and the defendant, as his residuary legatee, only receiving one of these shares, and their distributive shares had ever since been regularly received by the next-of-kin and their representatives.

In the month of February 1851, the defendant passed at the Stamp-office his residuary account of the estate and effects of Denham Jephson; and having been advised previously to this, that the annuity assigned to Jephson by Franks, although dealt with as personal estate, which had devolved upon his death intestate upon his next-of-kin, ought strictly to belong to him as the residuary devisee of Colonel William Jephson, the heir-at-law of Denham Jephson, inasmuch as it had been granted by the deed of assignment to the *heirs* of D. Jephson; no mention of this annuity was made in the residuary account which was settled and passed at the office of the Commissioners for Inland Revenue.

The conditional rule in this case was accordingly obtained on behalf of the Commissioners of Inland Revenue, and it was now sought to make this rule absolute, and to oblige the defendant to pay legacy duty upon this annuity. It was admitted that in all other respects the residuary account was correct.

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This annuity is payable out of the Consolidated Fund, and not out of any realty; and the nature of the *corpus* from which an annuity issues always determines its quality. Originally it was a mere chattel, and no subsequent dealings could alter its character. In the case of *The Countess of Holderness v. The Marquis of Carmarthen* (a), it was determined, that an annuity charged upon a fund like the present was a mere personal annuity, and as such passed by grant or transfer. It is therefore liable to legacy duty under the provisions of the Act imposing those duties. *The Earl of Stafford v. Buckley* (b) shows that it cannot be treated as real estate.

Greene (with him *Napier*, and *T. W. White*), contra.

The question here does not depend on the abstract point whether this pension was real or personal property, considering it in regard to the division of all property into those two classes. No duty is payable under the provisions of the statute, except in regard to what is a legacy in case there is a will, or be distributed amongst the next-of-kin in the event of an intestacy: ss. 5 and 7, 54 G. 3, c. 92. The Legislature have made the executor or administrator primarily responsible.—[PENNEFATHER, B. Your argument is that no duty is payable, *quoad* property which descends to the heir, but only *quoad* property devised or bequeathed to a legatee, or descendible to the next-of-kin.]—Precisely—such is the plain meaning of section 5; and we contend that this annuity devolved upon the heir of Denham Jephson upon his dying intestate, and not upon his personal representative, and that therefore no duty is payable in respect of it.

An annuity granted to a man and his heirs is a fee-simple, personal and inheritable: *Co. Lit.* 2 a, 144 b, and 20 a, where Lord Coke calls an annuity granted to a man and the heirs of his body “a fee conditional.” A personal annuity, but limited to the heir,

(a) 1 Bro. C. C. 377.

(b) 2 Ves. sen., 170.

is a hereditament liable to forfeiture on attainder: *Nevil's case* (a); and it is laid down in *Litt.*, s. 739, "That if a man grant an annuity to another, to have and to take to him and his heirs for term of another's life, if the grantee die, &c., that after his death his heirs shall have the annuity during the life of *celuy a que vie*," &c. Lord Coke, commenting on this passage, uses these strong words:—"This case is without question, that the heir of the lessee shall have the land to prevent an occupant; and so it is (as Littleton here saith), in case of an annuitie or of any other thing that lieth in grant, whereof there can be no occupant:" *Co. Litt.*, p. 388, a.

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In *Turner v. Turner* (b), Lord Loughborough says:—"If it is out of the coffers, it is personal only as to the remedy, but the property itself is real as to its descent to the heir." In that case the annuity was limited for life, with remainders over; and in *Taylor v. Martindale* (c), the Vice-Chancellor observes:—"There is no doubt that an annuity, though personal in its nature, may be granted to a man and his heirs." The annuity descends to the heir not as special occupant, but in the nature of a descendible freehold: *Vaugh.*, p. 199; *Bearpark v. Hutchinson* (d). The case of *Stafford v. Buckley*, which has been relied on upon the other side, decided that an annuity granted in fee, payable out of the Barbadoes revenues, was not a rent, as it did not issue directly out of lands, but that it was a fee-simple conditional at Common Law. There could be no special occupant of this annuity at Common Law. The Statute of Frauds could not give it to the executor upon the death of Denham Jephson; and unless he granted it over, it would become extinct, and no duty could be payable in respect of it: 3 *Bac. Abr.*, p. 192 (*Dodd's* ed.), *Estate for Life and Occupancy*, B 2. The 22nd section of 54 G. 3, c. 92, shows that it is the manner in which the property is to be administered, and not the description of the property, which fixes the duty. Property may be personal, and yet not pass to the executors as such: *Aubin v. Daly* (e). In pleading, this annuity would be described as a freehold: *Cro. Car.*, p. 171;

(a) 7 Rep. 34.

(b) 1 Bro. C. C. 324.

(c) 12 Sim. 158.

(d) 4 Moo. & P. 848.

(e) 4 B. & Al. 66.

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Bythe., by *Jarman*, *Annuity*, p. 446; Statute of Frauds, 7 W. 3,
 c. 12, s. 9; *Savery v. Dyer* (d).

Smyly, in reply.

The clear residue of the intestate's estate is liable to duty under the schedule of 55 G. 3, c. 184.—[PENNEFATHER, B. Is there any clause showing that duty is attachable to this fund, supposing it to be personal estate, but descendible to the heir?—In the case of intestacy all the personalty is liable. An annuity payable out of certain duties, though descendible to the heirs of the grantee by the limitations of the grant, is personal, and does not savour of the realty: *Redburn v. Jervis* (e).

Cur. ad. vult.

PIGOT, C. B.

Jan. 19.

I am of opinion that the legacy duty does not attach upon this annuity. There are two questions to be considered in deciding this case—First, what is the nature of the charge imposed by the Stamp Act? and secondly, is the property the subject matter of the present application of the peculiar species contemplated by the Act, and has it been held and enjoyed in such a manner as to bring it within the provisions of that enactment?

As to the nature of the property liable to duty, the Stamp Act does not impose the duty upon all personal estate indiscriminately, but only upon such personal estate as is enjoyed in a particular manner, and devolves on a particular class of persons; and it is clear, that no duty is incurred until the property devolves upon a person of the class specified in the Act. Unless the property assumes the character of a legacy, no legacy duty attaches; and unless it follows the course of distribution and descends to the next-of-kin, there can be no intestacy duty. The words of the statute make this manifest, and it is rendered more plain by that part of the

(a) Cro. Car. 173.

(b) 3 P. Wms. 265.

(c) 1 Cr. & Dix, Cr. Cas. 241.

(d) Ambl. 139; S. C. 1 Dick. 162.

(e) 3 Beav. 450.

Act which creates the remedy, as that remedy depends upon the particular class of persons who are empowered to deal with the estate; in the case of a legatee, the executor being liable, and the administrator in the case of the next-of-kin. Taking these portions of the Act together, it is clear that the duty is imposed where the right is acquired, and the possession of the property obtained in the manner pointed out by the statute; and therefore, if the right be not acquired or the possession obtained by the legatee or next-of-kin, such and such only being the parties indicated by the statute, the stamp duty does not attach.

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The next question is, whether the property in the present case devolved upon the next-of-kin as such? It has been admitted that if the grant had originally been made to Denham Norreys and his heirs, the estate could not have devolved upon his next-of-kin. In this case there is no will, which is important, as, in case the annuity had been bequeathed to a legatee, the case might have been regarded in a different aspect; but there being no will, it is clear that if this property had been limited in the original grant, as it appears to have been in the subsequent assignment, it would not have been chargeable with legacy duty. Now in this case the title of Mathew Franks to this annuity is complete. It is granted to him under the provisions of an Act of Parliament empowering such grants, and this grant is quite as valid as if it were the case of an individual in a private capacity who had granted a personal annuity to another. The annuity is then assigned by the original grantee to Denham Jephson and his heirs; and unless there be something in the nature of an annuity not granted originally to a man and his heirs, to distinguish it from an annuity that has been so limited, the two cases cannot be distinguished. There appears to me to be no distinction between the case of an annuity so created originally, and one assigned in that course of devolution. I can see no reason why the same rule should not apply to both cases. The estate is in either case equally transmissible to the heir, and this is the distinction which is of importance.

We must therefore decide in the present case that the property is not within the provisions of the Stamp Act imposing this duty.

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Two things are necessary in this case, in order to establish the right of the Crown to duty; first, that this property is in its nature personal estate, and secondly, that it ought to go distributively as personal estate, there being no will. If such property, though personal in its nature, be limited to a man and his heirs, it is not distributable as personal estate; but after the death of the grantee it will go to his heirs; and in that case will not be subject to duty. The only question here is, whether the fact of the original grant being for the life of the grantee can make any difference? It appears that this grantee, by the manner in which he dealt with it, gave it a new character. The person to whom he assigned it died intestate, and no one claims it as his personal representative. It is unnecessary to consider what the effect would have been if the assignee had bequeathed it by his will; in this case there was no will, and the property therefore devolved upon the heir, and was consequently not within the Statute of Distributions. The cases which have been cited show that if this annuity had originally been limited to Denham Jephson and his heirs, it would have gone in that course of devolution; and the mode of limitation in the present case makes no substantial difference, the effect being in both instances to designate a particular person to whom the estate is limited. As this is a case between the Crown and a subject, and one in which the latter, if unsuccessful, has no power of appeal, although the Crown will not be finally bound by our decision, we ought not to decide against the subject, except upon the clearest principle, where there does not appear to be any direct authority in point.

LEFROY, B.

I fully concur with the judgments which have been pronounced. If the question admitted of any doubt, I should feel bound to decide in favour of the subject, for the very excellent reasons which have been mentioned at the close of his judgment by my Brother PENNEFATHER, as the subject would otherwise be without redress; but while I make this observation, I have not any doubt as to

the correctness of the decision of the Court. Two questions arise in deciding the present motion; first, in respect of the Act of Parliament imposing the duty; and it is clear that it imposes this liability in respect of the property to which the person charged with the duty has become entitled, either as legatee or next-of-kin; but in either case it is a personal liability. In the present case, the grantee having died intestate, there can be no question raised as to the liability of a legatee, and if the property devolve upon the heir, the next-of-kin cannot claim it. Then the question remains, does it go to the heir under this grant, being a species of property which would not have devolved upon him without special limitation? The grant was made to a man and his heirs by a person who holds a life estate in the property; and we must consider whether the assignor had power thus to limit the grant. The rule of law is, that every instrument is to be so construed as most effectually to carry out the intention of the person executing it. This purports to be an assignment of the assignor's estate, which may be dealt with in this manner, without interfering with or qualifying the original grant. Why may not a man having a life estate grant it to any other man for his life, and after his death to his heirs, provided he does not exceed the limits of his original estate? It appears from the leading case before Lord Hardwicke, cited in the argument, that a man may limit an estate of this nature by creating a life estate in it, and a further estate in tail, and that he may vary the grant as he pleases. I do not see why such a course of limitation may not be adopted in this case as well as in that; and that, in the words of my Brother PENNEFATHER, a person may be designated to take the estate. Suppose the original grantee had wished to settle the property upon his son, he might have created an estate of this nature, and named each of the persons who should hold the estate in succession. There is nothing to prevent him adopting a similar course, and leaving the law to designate the person on whom the estate was to devolve, instead of naming that person himself. I therefore think that no legacy duty is payable in respect of this property.

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Rule discharged.

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THE GUARDIANS OF THE POOR OF THE
CARRICK-ON-SHANNON UNION

v.

THE GUARANTEE SOCIETY.

April 20, 24,
May 8.

A contract in writing was entered into between a Guarantee Society of the first part, and "A and B, the Vice-guardians, or the Vice-guardians for the time being, for and on behalf of the Carrick-on-Shannon Union, of the second part," whereby the former agreed, for the consideration therein mentioned, that during the employment of C as collector of poor-rate, the funds of the Society should be liable to pay to the party of the second part, "and to the persons for the time being constituting the said Vice-guardians, within three months after particulars of the loss should be furnished, all such loss not exceeding £500 as the party of the second part, and the persons for the time being constituting Vice-guardians, may sustain, from any act of fraud or dishonesty committed by C." This agreement was not under seal. A and B having been removed from the office of Vice-guardians, and the former Guardians reinstated, the latter brought *assumpsit* against the Guarantee Society, default having been made by C in the payment over of poor-rates which he had collected; and the declaration, having set forth the agreement, proceeded to aver that A and B, relying on the above-mentioned guarantee, had taken C into their service, as collector of poor-rates, and that he had accepted that office, and that the clerk of the union had delivered to him "a collecting book," "a rate-receipt check book," and "rate-receipt abstracts," and that it then and there became the duty of C to collect the rates, and to pay over the receipts to the treasurer of the union. It also averred that he had received certain sums of money as such collector, and did not pay them over, but fraudulently converted them, and that the Guardians had thereby sustained loss to a certain amount: and averred breach of their contract by the Guarantee Society.

Held, on demurrer, that the authority of the collector to receive the rates was derived from his warrant, and therefore that the declaration was bad, for the want of an averment of the issuing of a warrant to him.

Semle—The present Guardians are entitled to maintain this action under the terms of the agreement, but the defendants' liability must be limited to the time during which the Vice-guardians held office.

“ there became and were, by virtue of the statutable enactments in
 “ such case made and provided, the Guardians of the poor of the
 “ Carrick-on-Shannon union. And afterwards, and before the making
 “ of the said promise and agreement, to wit, on &c., at &c., the said
 “ Board of Guardians was duly dissolved by the Commissioners for
 “ administering the Laws for the relief of the Poor in Ireland, and
 “ one Richard Robinson and Rodolphus Mortimer were then and
 “ there duly appointed by the said Commissioners paid officers, to
 “ carry into execution the provisions of the several statutable enact-
 “ ments for the relief of the poor in Ireland, and were then and there
 “ duly empowered by the said Commissioners to act as Guardians of
 “ the said union ; and the said R. R. and R. M. then and there duly
 “ accepted the said office, and then and there acted as such Guardians,
 “ and then and there, while they so acted, became and were the Guar-
 “ dians of the poor of the Carrick-on-Shannon union, pursuant, &c. ;
 “ of all which the said Society had then and there due notice. And
 “ whereas also, after the making, &c., and after the happening of the
 “ loss thereafter mentioned, and after the delivery and receipt of
 “ the particulars and proof of said loss as thereafter mentioned,
 “ and before the commencement of the action, to wit, on &c., at &c.,
 “ the Commissioners for, &c., duly revoked and determined the said
 “ appointment of the said R. R. and R. M., pursuant, &c. ; and after-
 “ wards, and before the commencement of the action, to wit, on &c.,
 “ at &c., the plaintiffs were duly constituted and elected to be the
 “ Guardians of the said union, pursuant, &c., and then and there
 “ became and were, and still are, the Guardians of the poor of the
 “ said union, pursuant, &c. ; of all which the said Society then and
 “ there had notice. And whereas also, whilst the said R. R. and
 “ R. M. acted as such Guardians as aforesaid, and whilst they were
 “ the Guardians of the poor of, &c., to wit on the 1st day of Novem-
 “ ber 1849, one James Scott requested the said Guardians of &c., to
 “ wit the said R. R. and R. M., to take him into the service of the
 “ said Guardians of &c., in the capacity of collector of poor-rates
 “ within the said union, to wit in the Elphin, Kilblass and Aughrim
 “ electoral divisions of the said union, to which said request the said
 “ Guardians then and there agreed, provided the said Society would

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“guarantee the Guardians of, &c., against all loss not exceeding
 “the sum of £500, which the said Guardians might sustain from
 “any act of fraud or dishonesty committed by the said J. S. after
 “the 20th day of June then last past, and during his continuance in
 “the service of the Guardians of, &c., in the capacity aforesaid; of
 “all which the said Society had notice. And the plaintiffs aver
 “that thereupon afterwards, and before the said J. S. was taken into
 “the service of the said Guardians, &c., to wit on the 1st of August
 “1849, at &c., the said Society agreed with and promised the Guar-
 “dians of, &c., to wit the said R. R. and R. M., who then and there
 “were acting as such Guardians, as aforesaid, and then and there
 “were the Guardians of the poor of, &c., as aforesaid; of all which
 “the said Society had notice: which promise and agreement were in
 “writing, and in the words, letters and figures following, that is to
 “say :—

“Public Companies’ Form of agreement—No. 5267. £500. Gua-
 “rantee Society, No. 19, Birche’s Lane, London, established 1840,
 “empowered by special Act of Parliament, 5 Vic., session 1842.—
 “Agreement made on the 1st of August 1849, between the under-
 “signed three Directors of the Guarantee Society, on behalf of the
 “said Society, of the first part, and Richard Robinson and Rodol-
 “phus Mortimer, Esqrs., the Vice-guardians, or the Vice-guardians
 “for the time being, for and on behalf of the Carrick-on-Shannon
 “union, in that part of the United Kingdom called Ireland, of
 “the second part.”

And the agreement as set out in the declaration proceeded to
 state, that “The said Directors of the Guarantee Society, in con-
 “sideration of £5. 3s. 0d. paid on behalf of the party of the second
 “part, agree with the party of the second part, that during the then
 “current year, and every successive year in which the sum of £5
 “shall be paid to them, and they shall accept the same, during the
 “service of James Edward Scott as collector of poor rates, the funds
 “and property of the Society (on the conditions contained in the
 “deed of settlement of the said Society) shall be liable to pay to
 “the party hereto of the second part, ‘and the persons for the
 “time being constituting the said Vice-guardians,’ at the expira-

“tion of three months after full particulars and proof furnished
 “to the Society of the loss incurred, verified, if so required, by affir-
 “mation under 5 & 6 *W.* 4, c. 62, all such loss not exceeding £500,
 “and happening within a specified time, as the party of the second
 “part, and the persons for the time being constituting the said Vice-
 “guardians, may sustain from any act of fraud or dishonesty in the
 “persons employed; provided that the answers hereto given by the
 “said party to the second part to the questions lettered from A to I
 “inclusive be in all respects true and correct; and that the said
 “party hereto of the second part do, within ten days after the dis-
 “covery of any fraud or dishonesty of the person employed, and of
 “any matter in respect of which any claim may be intended to be
 “made, give notice in writing thereof, as far as the case will admit;
 “and that after such discovery, the guarantee therein contained shall
 “be at an end as to any subsequent loss by any act of fraud or dis-
 “honesty of the party employed.” The agreement also contained a
 proviso, “That the party making any such claim should thereupon
 “execute these presents, and if required by the said Society, when
 “lawful, arrest the person employed, for any offence that he may
 “have committed in such default, and supply necessary evidence
 “of such default; the party of the second part being indemnified
 “from all damages occasioned thereby: and that where any such
 “loss shall have been satisfied by the Society, satisfaction for such
 “claims shall be indorsed and signed, and the present agreement
 “given unto and for the benefit of the Society.

(Signed)

“ J. L. PRICE,	}	Directors of
“ P. COLQUHOUN,		the
“ J. BENSON,		Guarantee Society.
“ RODOLPHUS MORTIMER.		
“ RICHARD ROBINSON.		

“ ROBERT SCRIVENER, Accountant-general.

“ Witness to the signature of employer, JOHN B., Clerk. Ex-
 “ amined and registered, J. M.”

Averments, that the conditions contained in the deed of settle-
 ment referred to are the same as those contained in the agreement

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set forth; that the answers given by the Guardians of the poor of the Carrick-on-Shannon union, to wit, by the said R. Robinson and Rodolphus Mortimer, who were then acting as such Guardians, and were such Guardians, of which the Society had notice, and referred to in the agreement set forth, were answers to questions contained in a paper called "Form of Proposal for Guarantee," by which the said R. Robinson and R. Mortimer, being such Guardians, declared that the employers who required the guarantee are the Vice-guardians of the Carrick-on-Shannon union, residing at Carrick-on-Shannon, meaning thereby the Guardians of the poor of the Carrick-on-Shannon union; that the applicant J. E. Scott had collected the last two rates, and received the appointment on his own responsibility; that the necessity for giving security arose by Act of Parliament; that the amount required was £500, and the only security; that the office of the applicant was that of collector of poor-rates, the salary one shilling in the pound percentage, with no allowance for travelling expenses; that the accounts of the applicant would be audited once a-week, and the money lodged in bank once a-week; that no stock in trade would be entrusted to his custody for sale; that the checks used to secure accuracy in his accounts, and the period the employer would balance and close his cash accounts, would be, that his accounts should be audited once a-week; that no balance should be allowed to remain in his hands; that there was no outstanding account due from the applicant to the employer; that the Christian and surnames of the party to whom the security was to be made were Richard Robinson and Rodolphus Mortimer, meaning that the security was to be made to these parties as such paid officers then and there acting, and being the Guardians of the poor of the Carrick-on-Shannon union; of which the Society had notice.—Averment, that these answers are true and correct; that the Guardians of the poor of the Carrick-on-Shannon union, to wit, the said Richard Robinson and Rodolphus Mortimer, being and acting as such Guardians, and relying on such guarantee, took the said J. S. into their service as such collector of poor-rates in the said electoral divisions, and that he accepted the said office of poor-rate collector, and continued so in

that capacity ; that upon the said J. S. being taken into the service of the said Guardians as aforesaid, the clerk of the said union, to wit, one John Boyce, who then and there was the clerk of the said union, then and there delivered to the said J. S. as such collector as aforesaid a collecting book, a rate-receipt check-book, and rate-receipt abstracts, and that it then and there became and was the duty of the said J. S. as such collector to collect with due diligence all moneys payable on account of poor-rates for the district to which he was so appointed collector as aforesaid, to wit &c., and to give receipts out of the said receipt check-book to all persons from whom he should receive any rates, and to pay over to the treasurer of the said union, to wit, to &c., on account of the said Guardians weekly, and whenever the same in his hands should amount to £50, all moneys collected by him as such collector, and also to submit the said collecting-book, rate-receipt check-book, and rate-receipt abstracts to the said clerk of the union, and also at the same time to produce to the said clerk the receipts of the said treasurer. Avers, that although the said J. S. as such collector did receive divers sums payable as poor-rates from divers persons liable to pay poor-rates, &c., amounting to, &c., yet he did not pay them to the treasurer, nor produce his books to the clerk, although the latter was willing to audit them, but fraudulently converted the moneys he had so received to his own use, by reason of which default the Guardians had sustained a loss, &c. Avers, that said acts of fraud were first discovered by the Guardians on the 16th of September 1850, and not before, and that notice was given to the defendants within ten days after. Avers general performance by the plaintiffs, and breach by defendants.

There was a second count stating the demand in a similar form, but averring that the Guardians *continued* the collector in their service at his request.

There was also a count for money had and received.

Demurrer, in which the following points were noted :—That the agreement stated in the first count appears to have been made by the Guarantee Society and Richard Robinson and Rodolpus Mortimer in their individual capacities, and that it does not appear that

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the plaintiffs were parties to it, the agreement not appearing to have been made with the Guardians in their corporate capacity, nor with any person on behalf of the Guardians; that it does not appear that the collector was required to subject his accounts to audit, or that he refused to do so, or that notice of his refusal was given to the defendants; that it does not appear that the persons for whom it is alleged that the collector received poor-rates were in occupation, or otherwise interested in lands so as to be liable to pay poor-rate; that it does not appear that the collector was duly authorised to collect poor-rates, or what poor-rates he was authorised to collect.

There were similar causes of demurrer noted to the second count; and to the third the defendants pleaded the general issue.

Joinder in demurrer, and *similiter*.

Hayes (with *J. D. Fitzgerald*), for the demurrer.

The plaintiffs have no right of action; they are not the parties to sue, as the contract was made with the Vice-guardians, a totally distinct body from the Guardians, who are a corporation, and should contract under seal; and the intention evidently was to confine the contract to the period of office of the Vice-guardians. The question has been decided in *The Guardians of Waterford Union v. Walsh* (a); *Dance v. Girdler* (b). The object of the 28th section of the Poor-law Act (1 & 2 Vic. c. 56) is to show how the business of the Board of Guardians is to be transacted; and it may be admitted that if this purported to be a contract by the Board, and were so signed by the two Vice-guardians, it would have bound the Board. The question, however, rests on the construction of the contract, whether it was the intention of the Company to have contracted, except with the Vice-guardians? and the contract on the face of it purports to be neither with the Board of Guardians nor on its behalf: *Rex v. Patrick* (c).—[GREENE, B. There is an averment in the declaration, that the Vice-guardians are the Guardians, and by the demurrer that is admitted.]—Further, it does not appear that Scott was ever duly authorised to collect the rates, there being

(a) 1 Ir. Law Rep. 373.

(b) 1 Bos. & P., N. R., 34.

(c) 1 Leach, C. C., 253.

no averment that a warrant was delivered to him, which would be his authority under the 73rd section. Thirdly, the contract is based on the answers by the Guardians to the queries as to the duties and responsibilities of the collector. Among them it is stated that his accounts would be audited weekly; there is no averment that this was done.—[PIGOT, C. B. Suppose the non-auditing was in consequence of his default?—Then the Company should at once have been apprised of it. These provisos affected the contract in its essence.

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Carleton (with *Brooke* and *Robinson*), contra.

The contract is made with the Guardians generally. It is not necessary that the name of a corporation should be set forth with literal accuracy. A distinction is taken in the old cases between variances in the body and substance of the name, and in what are called the “excrescences:” *Ayrey’s case* (a); *Pitts v. James* (b); *Marriott and Pascal’s case* (c). The body and substance of the name is here; and even though the contract is entered into with individuals, if it be for the benefit of the corporation, it may sue on it: *Sydney College v. Davenport* (d). 1 & 2 Vic. c. 54, s. 27, prescribes the name of the corporation. There is no such term recognised in the Poor-law Acts as “Vice-guardians.” They become the corporation for the time being; and the word “Vice” may be regarded as an “excrescence.” Then the 28th section of 1 & 2 Vic. c. 56, prescribes the manner in which a contract may be entered into by Boards of Guardians, and the present contract is in conformity with that section. The case of *The Waterford Union v. Walsh* was that of a contract under seal, and no part of the name of the corporation was contained in it; it was a bond, and made payable to the Vice-guardians by name.

As to the objection that the contract is not under seal, the 28th section of the Poor-law Act dispenses with that necessity: *Ryan v. Guardians of Kildysart Union* (e).—[PIGOT, C. B. That was the

(a) 11 Rep. 20, b.

(b) Hob. 124.

(c) 1 Leon. 161.

(d) 1 Wils. 85.

(e) 2 Ir. Com. Law Rep. 1; S. C. 4 Ir. Jur. 30.

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case of an appointment of a medical officer, and we held that *such an appointment* was governed by the authority of a case before Lord Raymond—*Rex v. Chalk*—and by an order of the Poor-law Commissioners specially applying to it. That decision is not applicable to the present case. Your difficulty is that you have no contract under seal, nor in compliance with the 28th section of the Poor-law Act, which dispenses with the necessity for a seal, substituting for it the signature of *three Guardians* to the acts of the majority of the Board.]—The main object of that section was to insure that no act should be done or contract entered into by less than three Guardians, and to make the acts of the majority of the Board, when authenticated by the signature of three, as valid as if done by the whole Board; and here there is the signature of both the Vice-guardians, who represent the Board. But the Act nowhere requires that contracts under it should be under seal; on the contrary, the scope of it is to exempt Boards of Guardians from the operation of that stringent rule. Besides, this contract has been executed by the Guardians; they have paid the annual premium: *Taylor on Evid.*, p. 664; *Fishmongers' Company v. Robertson* (a). As to the auditing the collector's accounts, that part of his duty is by the statute, which the defendants are bound to know, under the control, not of the Board, but of the Commissioners; and we aver that it was his duty to produce his books to the clerk of the union weekly to be audited; that the clerk was ready and willing to audit them, but that he did not produce them. This was part of his default. As to the absence of an averment of the delivery of the collection warrant, the averment is that Scott was appointed collector, and "as such collector received divers sums payable as poor-rates from divers persons liable to poor-rates, in the electoral divisions of," &c., over which he was appointed. The liability therefore of the defendants arose on his receipt, and neglect to pay over, independently of any warrant.—[PIGOT, C. B. There is a case, *Kemp v. Wiggett* (b), decided on the authority of *Webb v. James* (c), applicable to this case.]—*Kemp v. Wiggett* is distinguishable. By the agreement

(a) 5 M. & Gr. 131; S. C. 6 Sc. N. R. 68.

(b) 10 C. B. 35.

(c) 7 M. & W. 279.

here there is a liability for the fraud of the party, which did not exist there. If the collector here had received the rates without a warrant, and made away with them, that would be a breach of his duty within the agreement.

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J. D. Fitzgerald, in reply.

There is no positive averment in the declaration of any contract with the plaintiffs—nowhere a promise by the defendant, nor consideration stated, except in the writing set out, which is only evidence of a contract.—[*Carleton* cited *Bainbrigge v. Wade (a)*].—The absence of an averment of the delivery of the warrant to the collector is fatal: *Kemp v. Wiggett*. To make the defendants liable, there must be both fraud by the collector and loss to the plaintiffs. But the collector's authority is derived solely from his warrant, and if payment were made to him without a warrant, the ratepayers would be liable to pay a second time. There could therefore be no loss to the plaintiffs until the warrant was delivered; and though this would not be a defence to the collector himself in an action by the Guardians, it would to his sureties. As to the execution of the contract, the plaintiffs cannot enter into such contract as the present except under seal: *Lamprell v. Billericay Union (b)*; *Diggle v. London and Blackwall Railway (c)*.

Cur. ad. vult.

PIGOT, C. B.

The question in this case arises on demurrer to the declaration, upon a contract, by which the defendant became liable in these terms—[Reads the agreement].—The declaration proceeds to state the appointment of Scott, and that he committed default in the following respect, viz.:—That the clerk of the union delivered to him a “collecting book,” a “rate-receipt book,” and “rate receipts,” and that it then became his duty to collect the rates, and to pay over to the treasurer on account of the Guardians weekly, or whenever the same should amount to £50, all moneys collected by him as such

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(a) 15 Jur. 573.

(b) 3 Exch. 283.

(c) 6 R. C. 590.

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collector. Breach—That between certain days he did, as such collector, receive divers sums, &c., from persons liable, &c., but did not pay them over as such collector, &c. Several questions were raised during the argument; and one objection, which was not much discussed, was re-argued with reference to some cases suggested by the Court. With some reluctance we must hold that upon that point this case is not distinguishable from *Kemp v. Wiggett*. The defect in the declaration is, that there is no averment that a “warrant” was delivered to the collector. Now, by the 73rd section of the Poor-law Act, 1 & 2 Vic., c. 56, the poor-rate collector’s right to receive the rates arises from the issuing of the warrant to him by the Guardians. That section enacts that the collector, as far as regards the collection of the rates, shall be deemed a paid officer of the union, and proceeds thus:—“And it shall be lawful for the Guardians of any “union to issue warrants under their seal to each such collector, “specifying the amount of money to be levied for the purposes of “the Act; and the collector, on the receipt of such warrant, is “hereby required and authorised to levy the money therein men- “tioned according thereto; and such money shall and may be “collected and levied, sued for and recovered by such and the same “ways and means as the grand jury cess, or the money applotted “on the several persons liable to pay the same, may be collected and “levied.” Therefore, taking the whole section together, and especially that portion of it which provides that the rates shall be collected in the same manner as the grand jury cess, it appears to have been the intention of the Legislature to require not only that the collector should have been appointed, but also authorised to collect by the warrant of the Guardians, to make his authority complete. Taking this into account, we have had in the present instance to consider whether, when parties liable to the rate have paid, though no warrant has been issued to the collector, and he commits default in not paying it over, the contract of the surety does not bind him to recoup the Guardians under such circumstances?

I own, if the case was not closed by authority, I should be disposed to hold that a person, in such a position as the collector here is supposed to have been, might fairly be considered as having

received the money in the capacity of collector, and that such a case would be within this guarantee. In *Kemp v. Wiggett*, however, and *Webb v. James*, it was decided that a collector's sureties were not liable for the loss of money collected without legal authority. In *Kemp v. Wiggett*, it appeared that the collector had been provided with the duplicate assessment warrants required by the statute with respect to one portion of the moneys which he had to collect; and as to that part it was not contended that the sureties were not liable; but as to the other portion, the Act required that duplicate assessments should be made by certain Commissioners, and that the warrants should not be given out for a certain time after the first day for hearing appeals, in order to enable parties who wished to dispute the assessments to appeal. The assessments were made, and payment received from certain parties before the time for appeal had expired; yet it was considered that there was no authority under such circumstances to the collector to receive the money; and although it had been paid to him professing to act in such capacity, the Court held that he did not receive it as collector. Jervis, C. J. (p. 50), says:—"It is conceded, on the authority of *Webb v. James*, that "unless the defendants are estopped from denying Lee's authority to "collect the sums assessed under schedule D, they can only be liable "in respect of sums officially received by the collector." And in p. 51:—"The question is, whether he was authorised to collect the "sums which he is charged with having received? That he was "appointed collector is clear; but was he ever armed with authority "as such collector to receive the assessments under schedule D? I "am of opinion that he was not." Maule, J., takes the same view. It is impossible to distinguish that case from the present. The only difference between the Acts is one on which we were very anxious, if possible, to have founded our judgment:—it was this: that according to the view of the Court, in *Kemp v. Wiggett*, the liability to pay the tax did not arise until after the period for appeal had passed. According to the Poor-law Act, parties are liable to pay pending appeal; but having regard to the 73rd section, and to the principle on which these cases were decided, establishing that there must be full authority to the collector to receive the rate, and that until then

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he is not acting officially within the terms of the contract, we must hold that such is the position of the party here. In practice also we know that the warrant is a copy of the assessment; it is that by which the collector is to receive, and the ratepayers to know, their liability.

It is averred in the declaration that a "collecting book," and "rate-receipt check book," and "rate-receipt abstracts" were given to the collector; and that having received these documents, it became his duty to collect the rates. But a "collecting book" is not the instrument from which the collector's authority flows. The warrant is that which completes his capacity of collector, and which completion is contemplated by the contract of his sureties. We were considering whether we might not hold that, under the large terms of this contract, the sureties had rendered themselves liable to the Guardians for any act of dishonesty on the part of the collector; and whether, in violation of his duty, he did not commit a fraud contemplated by the agreement? But this question does not arise on the pleading. The breach in the declaration is narrowed to this—that, being bound as collector to receive and pay over the rates, he did not do so. The case therefore comes directly within the authorities referred to.

Another question arose, on which it may be as well to express an opinion. It appears by the declaration that this contract was entered into by the Guarantee Society with the Vice-guardians in their official and corporate capacity. In terms, it was with "Richard Robinson and Rodolphus Mortimer, the Vice-guardians, "or Vice-guardians for the time being, for and on behalf of the "Carrick-on-Shannon Union, of the second part;" and the contract was "to pay to the party hereof, of the second part, and to the persons for the time being constituting the said Vice-guardians." This contract is not under seal; and the plain meaning of it is that the defendant contracted with the Vice-guardians for the time being, for and on behalf of the union; for on the face of it, it is contemplated to last beyond the period of office of the persons with whom it is made. Substantially it is a contract with the Board of Guardians in its corporate capacity, but limiting the liability of

the defendant to the time within which Vice-guardians shall be in office ; and the declaration confines the breach to that time. I am therefore of opinion that the present Guardians may sue on the contract. We however decide the case upon the other point.

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GREENE, B.

I was very anxious, if possible, to sustain the breach in this case, on the ground that, whether the collector was formally authorised to receive the rates or not, yet as he professed to receive them as such collector, he might be liable to the Guardians for money had and received to their use ; but this view of the subject was equally open in the cases cited, and therefore I must reluctantly hold that the demurrer must be allowed.*

* PENNEFATHER, B., *absente*.

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EARL OF MOUNTCASHELL

v.

VISCOUNT O'NEILL.*

(*Queen's Bench.*)

Nov. 5, 6.

A, being owner in fee, demised certain lands to B, reserving out of the demise, *inter alia*, "all timber and other trees both above and under ground;" and the indenture contained a covenant by B that he would "uphold, sustain and keep all the

TROVER, for trees growing in and upon the lands of Claggan, in the county of Antrim—Plea, the general issue.

The case came before the Court on a special verdict, which found that, by an indenture of lease of the 2nd of March 1816, the then Earl of Mountcashell, being seised in fee of the said lands, had demised the same to Earl O'Neill, together with all the rights and appurtenances thereunto belonging, "excepting, and always reserv-

houses, &c., *plantation of trees*, and other improvements whatsoever, that now are, or at any time hereafter during the said demise shall be, built or made," &c.

Held, that notwithstanding such covenant, the lessee had a property in the trees planted by him during the term, if such were registered, pursuant to the 23 & 24 G. 3, c. 39.

The 1st section of that statute enacts, that any tenant for life or lives, by settlement, dower, courtesy, jointure, lease, or office, civil, military or ecclesiastical, impeachable of waste, or any tenant for years exceeding fourteen years unexpired, who shall plant timber trees shall be entitled to cut same. And by section 2 it is provided that the tenant so planting shall lodge an affidavit and give notice in the form following—[It then set out a form.]—*Held*, that all the persons enumerated in the 1st section were entitled to the privilege thereby granted, and that the form of affidavit thereby given might be moulded to suit the nature of the tenancy of each person so registering.—[LEFROY, C. J., *dissentiente*.]

The lessee gave notice of eight separate plantings, and in seven of these the affidavit of registry was made by the agent of the lessee, not by the lessee himself.

Held, that such affidavit, made by the tenant, steward or agent, was sufficient; the words, "in form following," in the 2nd section of the Act, being merely directory.—[LEFROY, C. J., *dissentiente*.]

The affidavit as to one planting was sworn by the tenant himself, but the trees planted were stated to be on two denominations of land, without specifying the quantity on each: both were held under the same landlord, and the tenure of the second denomination did not appear.

Held, that such affidavit was bad, and the registry insufficient.—[*Dissentientibus* CRAMPTON, J., and PERRIN, J.]

In another affidavit, two denominations of land were also comprised, but they were held under different landlords, and the number of trees planted on each was lumped, and the quantity planted on each was not specified.

Held, such affidavit was bad, and the registry insufficient.

* A writ of error having been lodged in this case, it is printed in advance of the Term in which it would ordinarily appear.

“ing, out of the said demise, all mines, minerals, coals and quarries of
 “marble, freestone and slate, and all *timber and other trees* both above
 “and under ground,” *Habendum* for three lives (one of which was
 still in being.) This indenture contained a covenant to this effect:—
 “And the said Earl O’Neill doth for himself, his heirs and assigns,
 “covenant, promise and agree to and with the said Earl of Mount-
 “cashell, his heirs and assigns, that he, the said Earl O’Neill, his
 “heirs and assigns, shall and will from time to time, during the said
 “demise, well and sufficiently uphold, sustain and keep, all the
 “houses, edifices, buildings, fences, ditches, drains, *plantations of*
 “*trees* and other improvements whatsoever that now are, or at any
 “time hereafter during the said demise shall be, built or be made
 “on the said demised premises, in good and sufficient tenantable
 “order, plight, condition and repair; and at the end or sooner deter-
 “mination of the demise (which shall first happen) shall and will
 “peaceably and quietly yield and deliver the said premises in the
 “like good tenantable order, plight, condition and repair, in all
 “respects, unto the said Earl Mountcashell, his heirs and assigns.”

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The verdict further found that Earl O’Neill became by virtue thereof seised in his demesne as of freehold for the term of lives thereby granted, and so continued until his death on the 26th of March 1841; on which event the residue of the term and estate granted by the said indenture became legally vested in his brother, the present defendant. That the Earl of Mountcashell, down to the time of his death, on the 27th of October 1822, was seised of, and entitled to, the reversion and inheritance in fee-simple in the said lands; and that the plaintiff was his eldest son and heir-at-law, and was now seised of, and entitled to, said reversion.

That after the execution of said indenture, and within twelve calendar months before the date of the affidavit therein mentioned, Earl O’Neill caused to be planted, partly on the lands demised by the said indenture, and partly on the lands of Aghafattan, then held by him as tenant to Earl Mountcashell, the several trees stated in the notices therein mentioned to have been published in the *Gazette*, and set out in the affidavit—that is, part of the trees on the said lands of Claggan, and the remainder on the lands of

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Aghafattan; and that on the 5th day of June 1816, he had lodged with the Clerk of the Peace of the county of Antrim an affidavit sworn by him on the 20th of May 1816, before a Justice of the Peace; and which affidavit still remained on a separate file amongst the records of the county. The affidavit was in the following words and figures :—

“ County of Antrim, }
to wit. }

“ I, the Right Hon. Charles Henry St. John,
“ Earl O'Neill, do swear that I have caused to
“ be planted, within twelve calendar months last past, on the lands
“ of Claggan and Aghafattan, in the parish of Skerry, held by me
“ from the Right Hon. Stephen Earl of Mountcashell, the following
“ trees, viz. :—oak, 10,000; ash, 14,900; larch, 32,900, &c.; and
“ that I have given notice to George Joy, agent to the said Earl of
“ Mountcashell, under whom I immediately derive, of my intention
“ to register said trees, twenty days at the least previous to this
“ day; and that I have given notice of my intention to register said
“ trees, by public advertisement, in the *Dublin Gazette*, thirty days
“ at the least previous to the date hereof.—O'NEILL.

“ Sworn before me this 20th day of May 1816.—P. AICKEN, J.P.

“ Received and filed 5th of June 1816.—S. DARCUS, Acting Clerk of the
Peace, county Antrim.”

The notice in the *Gazette* by Earl O'Neill was also duly found on the 18th of April 1816, and also the notice on George Joy, as agent of Lord Mountcashell, and that he continued agent to the plaintiff in respect of the lands to which the several notices related.

The verdict further found that Earl O'Neill, up to the time of his death, employed one William M'Auliffe as his steward and agent in managing the lands of Claggan, and authorised him to give the several notices, and lodge with the Clerk of the Peace the several affidavits mentioned in reference to the planting of trees, on behalf of Earl O'Neill. It then found that within twelve calendar months next before the swearing of the affidavit by M'Auliffe, he, as such steward and agent, with the assent and on behalf of Earl O'Neill, planted, or caused to be planted, on the lands of Claggan the several trees mentioned in the affidavit of the said William M'Auliffe; and that on the 18th of October 1820, he lodged with

the Clerk of the Peace such affidavit, and that same still remained among the records of the county. That affidavit was as follows :—

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“ I William M'Auliffe do swear that I have planted, or caused to
“ be planted, within twelve calendar months last past, for the Right
“ Honorable Charles Henry St. John Earl O'Neill, on the lands of
“ Claggan, in the parish of Skerry, lower half barony of Antrim,
“ and county of Antrim, held by the said Earl O'Neill from the
“ Right Hon. Stephen Earl of Mountcashell, the following trees
“ (enumerating them), and that notice has been given to George
“ Joy, agent to the said Earl of Mountcashell, under whom the said
“ Earl O'Neill immediately derives, of his Lordship's intention to
“ register said trees, twenty-one days at the least previous to this
“ day ; and that notice has been given of his Lordship's intention to
“ register said trees by public advertisement in the *Dublin Gazette*
“ thirty days at least previous to the date hereof.

“ WILLIAM M'AULIFFE.

“ Sworn, &c.—P. AICKEN, J. P.

“ Received 18th of October 1820.—S. D., Clerk of the Peace.”

It was further found that after the planting of said last mentioned trees, and thirty days and upwards before said last mentioned affidavit, viz., on the 6th of July 1820, Earl O'Neill gave notice in the *Gazette* as follows :—

“ I, the Right Hon. Charles Henry St. John Earl O'Neill, do
“ hereby give notice that I have, within twelve calendar months
“ last past, caused to be planted on the lands of Claggan, in the
“ parish, &c., held by me from the Right Hon. Stephen Earl of
“ Mountcashell, the following trees (enumerating them), and that
“ I intend to register the same with the Clerk of the Peace of the
“ county of Antrim, pursuant to the statute in that case made and
“ provided.—Given under my hand this 20th day of June 1820.

“ O'NEILL.”

It then found that due notice was given of such planting, twenty days previous to the date of M'Auliffe's affidavit, to George Joy agent as aforesaid.

It was further found that, within twelve calendar months before the date of the affidavit of M'Auliffe, next mentioned, he, as such

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agent and steward, caused to be planted partly on the lands of Killycham, in said county, then held by the said Earl O'Neill as tenant thereof to Alexander Davison under a lease, and partly on the lands commonly called White Parks, being part of the said lands of Claggan, the several trees mentioned in said affidavit, which affidavit was also duly lodged with the Clerk of the Peace of the county. That affidavit was in this form :—

“County of Antrim, } “I, William M'Auliffe, do swear that I have
to wit. } “planted, within twelve calendar months last
“past, for Earl O'Neill, on the lands of Killycham, held by the
“said Earl O'Neill from Alexander Davison, and on the lands
“commonly called White Parks, being part of the lands of Clag-
“gan, held by the said Earl O'Neill from the Earl of Mountcashell,
“all in the parish of Skerry, in the lower half barony of Antrim,
“the following trees, viz. (enumerating them); and that I have given
“notice to the said Alexander Davison, under whom the said Earl
“O'Neill immediately derives the said lands of Killycham, and to
“George Joy, agent to said Earl of Mountcashell, under whom the
“said Earl immediately derives the lands called White Parks, being
“part of said lands called Claggan, of my intention to register said
“trees, twenty-one days at the least previous to this day, and that I
“have given notice to register said trees by public advertisement in
“the *Dublin Gazette*, thirty days at least previous to the date hereof.

“WILLIAM M'AULIFFE.

“Sworn before me, &c., 24th October 1821.—P. A., J.P.

“Received 25th October 1821.—S. DARCUS, Clerk of the Peace.”

The verdict then found another notice by M'Auliffe, of the 20th of September 1821, of this planting on the lands of Killycham and Claggan as above, and that notice was given in the *Gazette*.

It further found five other notices and affidavits given and made by M'Auliffe as agent to Lord O'Neill, and all in a similar form.

The special verdict then found that the estate, right, title and interest of the Earl O'Neill in the trees planted on the lands, and enumerated in the eight affidavits of registry, was, on the 17th of December 1850, and since, vested in the defendant Viscount O'Neill.

It then found that the defendant had cut down, on the 7th of

January 1851, and severed from the lands of Claggan, certain trees, and converted them to his own use, the same being some of the trees enumerated in the affidavit of Earl O'Neill, of the 20th of May 1816, and in the notice of the 18th of April 1816.

It further found a cutting down and conversion of the trees mentioned in M'Auliffe's affidavits and notices, as before, and concluded with an assessment of nominal damages for each cutting.

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O'Callaghan and *Brewster* argued the case on behalf of the plaintiff.

There are eight registries in question, the first of them being in 1816; and as to that registry, the affidavit and the notice prescribed by the statute have been made and given by the tenant himself, viz., Lord O'Neill; there is therefore no general objection to that registry, such as affects the others: but we object to the affidavit in that case as insufficient, because it does not specify the number of trees planted on the different denominations of land. There are two denominations named, and the number of trees planted is lumped, without any detail of how many are in one denomination, and how many in the other. The object of 23 & 24 G. 3, c. 39,* was to earmark the trees,

* 23 & 24 G. 3, c. 39:—"An Act to Amend the Laws for the Encouragement of Planting Timber Trees."

Section 1.—"Whereas the laws for the encouragement of tenants to plant timber trees have proved ineffectual: Be it enacted, &c., that from and after the passing of this Act, any tenant for life or lives, by settlement, dower, courtesy, jointure, lease, or office civil, military, or ecclesiastical, impeachable of waste, or any tenant for years, exceeding fourteen years unexpired, who shall plant, or cause to be planted, any timber trees of oak, &c., shall be entitled to cut, sell and dispose of the same, or any part of the same, at any time during the term."

Section 2.—"Provided always, that any tenant so planting, or causing to be planted, shall, within twelve calendar months after such planting, lodge with the Clerk of the Peace of the county, or county of a city, where such plantation shall be made, an affidavit, sworn before some Justice of the Peace of the said county, reciting the number and kinds of the trees planted, and the name of the lands, in form following:—

"I, A B, do swear that I have planted, or caused to be planted, within twelve calendar months last past, on the lands of —, in the parish of —, held by me from —, the following trees [here reciting the number and kinds of trees], and that I have given notice to the person or persons under whom I immediately derive, or his, her, or their agent, of my intention to register said trees, twenty days

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and to specify the particular rights to be determined by the holding.—[MOORE, J. If there were two landlords there might be uncertainty, but that is not the case here.—CRAMPTON, J. It does not appear on the special verdict that the lands were held under different tenures.]—The Legislature contemplated that if there were twenty denominations of land in one lease, there should be a separate registry; for there is nothing in the Act of Parliament to say that all are to be in one registry. The Clerk of the Peace is to keep the affidavits regularly, and enter them alphabetically; the registry is the affidavit, it is not what the Clerk of the Peace enters in the book.—[PERRIN, J. The affidavit and the entry constitute the registry.]—But if there be no affidavit, there can be no registry, and there must be an affidavit for each denomination of land, a registry of the trees in each denomination.—[CRAMPTON, J. Denomination is a vague term, and the names of denominations vary, and many are often comprised in one; besides, denomination is not in the 2nd section.]

Then as to the other seven registries, there is the general objection, that the affidavit filed for the purposes of the Act was made not by the tenant himself, but by his steward or agent. The form of the affidavit given by the Act necessitates that it should be made by the tenant himself; it is this:—"I, A B, do swear, that I have "planted or caused to be planted, within twelve calendar months "last past, on the lands of —— in the parish of ——, held by me "from —— the following trees, &c., and that I have given notice to "the person or persons under whom I immediately derive, or his, her "or their agent, of my intention to register said trees," &c. Where a statute giving certain rights, makes the signing a document necessary, unless the statute adds the words "by his agent," the principal cannot delegate his signature. The first statute as to planting, 5 & 6 G. 3, c. 17, did not require any registry. The 3rd section simply

at least previous to this day; and that I have given notice of my intention to register said trees by public advertisement in the Dublin Gazette, thirty days at least previous to the date hereof;" or else—"and that I have also given notice of the same in writing to the head-landlord, owner or owners of said ground, or his, her, or their agent, twenty days previous to the date hereof" (as the case may be).

directed a certificate of the planting of the trees, under the hand of the tenant, to be lodged with the Clerk of the Peace, which certificate was to be by him kept and entered in an alphabetical book, by the denomination of the land in the county, and that certificate or a copy of it was to be evidence of notice of the planting; but if the defendant's case be right, a certificate under any man's hand would have been sufficient.—[LEFROY, C. J. Clearly, if the statute contemplated a personal act, the act of an agent would not suffice.]—Then did the Legislature, in passing the second Act, 23 & 24 G. 3, c. 39, intend to make the act of the tenant more or less formal? It increased the stringency of the previous provisions and directed an affidavit to be made.—[LEFROY, C. J. The first Act required a certificate under the hand of the tenant, but the second Act does not say that an affidavit under his hand is to be made in form following.]—The words of the statute are mandatory, and they were inserted to give the landlord an opportunity of testing the fairness of the tenant's case. That affidavit is to be lodged with the Clerk of the Peace. The 6th section provides for fraudulent registries, and enacts, "That any person under whom the lands shall be held, &c., whereon the trees registered, or the inclosures registered in pursuance of this Act may be, and who shall think himself or herself aggrieved by a fraudulent registry, may apply to the Justices of said county, assembled in Quarter Sessions," &c.; and the 2nd section provides, "That any tenant so planting, or causing to be planted, shall, within twelve calendar months after such planting, lodge with the Clerk of the Peace of the county, or county of a city, where such plantation shall be made, an affidavit sworn before some Justice of the Peace of the said county, reciting the number and kinds of the trees planted, and the name of the lands, in form following," &c. If at the end of twenty or forty years we were trying the facts, it would be enough, on the view of the other side, for Lord O'Neill to prove that he had planted the trees, which could be done by proof of lodging the affidavit.—[MOORE, J. The form of the affidavit imports that it should be made by the tenant.]—There are objections to the form of the affidavit as well as to its contents,

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which show the impossibility of a compliance with the Act of Parliament if the affidavit be sworn by the agent; in the registry of 1820, the affidavit says:—"Notice has been given," and in all the others, the affidavits say:—"I have given notice of my intention;" the agent thus swearing he was the party who gave notice of his own intention to register for his principal. This shows the inconvenience of departing from the form given by the Act.—[LEFROY, C. J. The maxim "*De minimis non curat lex*" may apply to these.]

As to the third registry, the affidavit is entirely defective; the lands there included are held under separate immediate landlords, and the affidavit specifies no distinction as to the planting on the lands of one or the other. The form given by the statute should be strictly followed: *The King v. Jefferies* (a); *Davison v. Gill* (b); *Goss v. Jackson* (c).

As to the exception in the lease, *Galwey v. Baker* (d) rules it; it is a covenant within the 21st section of 23 & 24 G. 3, c. 39: "That nothing herein shall be construed to extend or relate to any trees planted, or to be planted, in pursuance of any covenant contained in any lease, nor to affect or invalidate any such covenants."—[MOORE, J. That section can have no bearing here, for this is a covenant to preserve what shall be planted, not a covenant to plant.]

J. E. Walsh and *Joy* (with them *J. D. Fitzgerald*) appeared on behalf of the defendant.

It is plain that neither a covenant nor exception can take away the right of the tenant; and in the case of *Galwey v. Baker*, Lord Brougham says:—"Why should a person stipulate for a property in trees which might never come into existence, since, by making such a stipulation, he would in all probability prevent the tenant from planting them? The clause which confers the power of entering on the land, and taking and carrying away trees, does not apply to trees planted by the tenant—it refers only to those things in which the landlord had a legal vested right."

(a) 4 T. R. 767.

(b) 1 East, 64.

(c) 3 Esp. 198.

(d) 7 Cl. & Fin. 379.

The statutes here in question furnish their own commentary—the 5 & 6 G. 3, c. 17, required the thing prescribed to be done by the tenant himself; but the 23 & 24 G. 3, c. 39, relaxed that stringency. Its recital is:—“Whereas the laws for the encouragement of tenants to plant timber trees have proved ineffectual,” &c.; and its first section enacts that, “Any tenant for life or lives, by settlement, dower, courtesy, jointure, lease, or office civil, military or ecclesiastical, impeachable of waste, or any tenant for years exceeding fourteen years unexpired, who shall plant, &c., shall be entitled to cut, sell and dispose of the same,” &c. The words in the 2nd section “in form following,” show that a strict compliance with the precise words of the affidavit is not necessary: it might be different if the word had been “tenor following:” *King v. May* (a); *Wright v. Clements* (b). A substantial compliance with the affidavit is enough, and any one who can positively affirm to the facts may make it.—[PERRIN, J. In 1 *Fur. Land. & Ten.*, p. 669, in note, as to substantial compliance with the Act, it is said:—“The affidavit will be sufficient if it contains in substance all the matters required by the Act, though the form given by the statute be not strictly pursued.” Suppose the case of an infant or a female, would it be requisite that they counted and measured the trees planted, as directed by the 5th section?—The passage in *Furlong* refers to the notice as to inclosing coppice, and it shows that such may be served by an agent. In the form of affidavit in the statute, the words “held by me” occur, and in the notice “me” is left out. The notice prescribed by the 4th section shows that the affidavit may be made by any one.—[PERRIN, J. The case of a middleman taking lands and intending to inclose coppice seems to have been contemplated.—[MOORE, J. The case of a minor may be suggested.]—Lunatics and absentees would be excluded planting, and so would Quakers and Moravians, if a literal compliance with the Act of Parliament by an affidavit of the tenant himself be necessary. In prescribing a form, the Legislature simply directs specifying the number of trees and the land. The statute in this is but directory; for, assuming that the Clerk of the Peace failed in doing his part of

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(a) Doug. 193.

(b) 3 B. & Ald. 503.

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the duty, would the landlord or tenant be thereby prejudiced? Contemporaneous usage must be regarded here: *Sheppard v. Gosnold* (a); *Magistrates of Dunbar v. Duchess of Roxburghe* (b); and as to Courts complying with formalities: *Shuttleworth's case* (c); *Gardiner v. Blesinton* (d); *In re Derosne's Patent* (e).

Was it substantially the intention of the Legislature, that in order to validate the registry, the affidavit should be made by the tenant actually occupying the land? The Act does not confine itself to landlords and tenants: it embraces tenants for life, tenants by dower, by courtesy, and tenants holding by virtue of some office.—[LEFROY, C. J. There is a proviso singling out tenants, strictly so called.]—But the statute legislates for a class of tenants who are strictly not tenants at all. How could a tenant in dower state, according to the form, “which lands I hold under A B?” and, if so, how can it be argued that no form of affidavit is to be used, but a form applicable to one set of cases?—[PERRIN, J. It must state the kind and number of trees planted, and the name of the land, “in form following.” The 6th section of the statute suggests the only tribunal before which the form of affidavit could be questioned.—CRAMPTON, J. If the registry were an honest one, but the name of the lands was omitted, it could not be examinable under that 6th section.]—In *The King v. The Poor-law Commissioners* (f), it is said:—“If the clear language be in accordance with the plain policy “and purview of the whole statute, there is the strongest reason for “believing that the interpretation of a particular part inconsistently “with that is a wrong interpretation.” As to the general policy of the statute, it is immaterial to the landlord who makes the affidavit, if it be an affidavit as to a fact which induces him to make inquiries on the subject; the affidavit is not conclusive, it is but preliminary to the landlord going forward and ascertaining the facts. In *Doe d. Governors of the Bristol Hospital v. Norton* (g), Parke, B., says (p. 928):—“Unless it is very clear that we should be doing violence

(a) Vaugh. R. 159.

(b) 3 Cl. & Fin. 335.

(c) 9 Q. B. 651.

(d) 1 Ir. Ch. Rep. 64.

(e) 4 Moore Priv. Coun. Cas. 416.

(f) 6 A. & E. 7.

(g) 11 M. & W. 913.

“to the language of the Act, by adopting any other construction,
 “the great inconvenience of that suggested by the defendant may
 “certainly afford fair ground for supposing that it cannot be what
 “was contemplated by the Legislature, and may well warrant us in
 “looking for some other interpretation.”—*Co. Lit.*, 258, *a*.

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The importance of negative words in a statute is not to be overlooked: *The King v. The Justices of Leicester* (a); *The King v. The Inhabitants of Birmingham* (b).

It is objected that two denominations of land are included in one affidavit; but is a tenant, if he took several fields of land and planted thereon, to make a separate affidavit for each field? That 6th section, already referred to, concludes the objection, for any thing calculated to mislead the landlord is thereby provided for.—[LEFROY, C. J. The state of circumstances when the tenant's lease expires would remove that difficulty.—MOORE, J. Your difficulty is to get rid of the positive words of the 2nd section, requiring the affidavit to recite the number, the lands held under the tenancy, and the number of trees on the lands of which the party is tenant.]—The section contains no negative words, and the Court will presume in favour of a registry after forty years' enjoyment.

Brewster replied.

Cur. ad. vult.

MOORE, J. Having stated the pleadings and facts, proceeded to say:—

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The question is, to which of the two parties did the trees belong? The plaintiff claims them by virtue of his Common Law right, as owner of the inheritance; the defendant claims them, under the statute 23 & 24 G. 3, c. 39, as planted by his brother, and duly registered under that Act; and the question to be decided is, whether all the eight several plantings, or any and which of them, have been duly registered?

It appears on the special verdict, that, on the occasion of the first planting, the affidavit of registry was made by Earl O'Neill

(a) 7 B. & C. 12.

(b) 8 B. & C. 35.

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himself; but that on the seven subsequent plantings, the affidavit was made by the steward and agent of the Earl, and acting on his behalf. It is contended on the part of the plaintiff, that none of the said seven plantings have been duly registered under the statute, on the broad ground that the statute requires the affidavit to be made by the tenant planting, and that an affidavit made by his agent is no sufficient registry.

This is a question of great importance, as it involves the construction of a statute in general operation through the kingdom. The statute on which the question arises is 23 & 24 *G.* 3, c. 39. It is entitled "An Act to amend the laws for the encouragement of planting timber trees."—[His Lordship read the first section.]—On this first section no question does or can arise; for it is plain that every tenant for life, or lives, created by any of the ways mentioned, is entitled to the privilege given. Then comes the second section—[reads it.]—I think it plain by this section it was intended, that the performance of certain acts was necessary as a condition precedent to the enjoyment of the privilege by some one, if not all, of the tenants enumerated in the first section.

It has been contended, that the second section is only applicable to tenants holding by lease, and that in fact tenants for life holding by any other title are not bound to register. I cannot concur in this view. I think that the second section is co-extensive with the first, and that every person to whom a privilege is given by the first is bound to register under the second, and that if he does not do so, he can have no privilege. The first section says, "that *any tenant* for life or lives," &c., shall have the privilege, and the second uses the exact same words: "provided always that any tenant so planting shall lodge," &c. It appears to me that the words "any tenant," in the second section, must refer to similar words in the first, and embrace the same class of persons.

The privilege given by the statute is in derogation of the Common Law right of the inheritor; and I think the object of the second section was, that the person whose Common Law right was to be destroyed should have notice of the planting, and an affidavit of the facts and circumstances kept among the records of the county. I can

see no reason why one class of tenants for life should be bound to register, and another class exempted. I can find no sufficient words in the Act to show that any such exemption was intended; the natural interpretation of the words used is the other way: and I have brought my mind to the conclusion that every tenant for life, no matter by which of the modes in the 1st section he may be created, is bound to register, in order to entitle him to the timber which he plants. I think this view is strongly fortified by reference to the Timber Act next preceding;—it is the 5 G. 3, c. 17. The 2nd section has precisely the same enumeration of tenants for life as in the 1st section here; and the 3rd section says:—"Provided always that *each person so planting* shall lodge a certificate." I think it would not be possible to confine these words to any particular class. The words "any tenant so planting" appear to me to be fully as strong, and to express the intention of the Legislature, that those who were to have the privilege should comply with the condition of registry.

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If I be right in this view, then the next question will be, how is the registry to be made? The 2nd section directs that an affidavit shall be lodged with the Clerk of the Peace "in form following." I think it must be admitted that the form given implies that the affidavit should be made by the tenant planting; and the plaintiff contends that the statute is mandatory on this point. It is plain that the form given is only applicable to one species of tenancy—that by lease. If I be right in saying that the 2nd section applies to every tenant for life mentioned in the 1st section, then the form given must be varied and departed from, when a tenant by settlement or courtesy was to register; and I think it follows as an inference, that the form given was intended only as a model to be adapted to the circumstances of each case, but substantially stating the matters required. The enacting part of the 2nd section does not direct the affidavit to be made by the tenant himself, but only that he shall lodge an affidavit.

I think that, to hold the form given to be mandatory, would be calculated to create a great obstruction to the operation of the Timber Acts. They were framed to accomplish a great public purpose,

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to supply the want of timber in Ireland, by inducing persons, through the medium of their own interests, to plant. It may frequently happen that the tenant for life, even by lease, may be an infant, a lunatic, or absent from the country, and thereby unable to make an affidavit in person. All these persons would be excluded from giving effect to the Act; and I think that this great inconvenience and obstruction is a fair ground for a broad and liberal interpretation of the Act, and to justify the Court in saying that the 2nd section was not to be considered mandatory as to the precise form given.

I am, for these reasons, of opinion that the objection taken by the plaintiff to the seven affidavits is not sustainable.

There is another objection going to all the plantings. The lease contains a covenant that the lessee should during the demise uphold, sustain and keep all the houses, *plantation of trees*, &c., that then were, or at any time thereafter during said demise should be, built or made on the demised premises, in good and tenantable repair; and the 21st section enacts that nothing therein shall be construed to extend or relate to any trees planted or to be planted in pursuance of any covenant contained in any lease, nor to affect or invalidate any such covenants. It appears to me perfectly clear that the true meaning of this section is, that if the tenant for life were bound by a covenant to plant, that the statute would not extend to him, because he had entered into a contract to do a certain thing, and being under an obligation to perform that act, the statute was unnecessary in such a case. It therefore has no application to this covenant.

An objection was then taken to the first and third plantings. It appears by the affidavit made on the occasion of the third planting that it does not specify the number of trees planted, and that there is uncertainty in it, one portion of the lands being held under one landlord, and the other under another, and that therefore it is not a compliance with the Act. The 2nd section appears to me distinctly to mean that, where a party seeks the benefit of a planting on any particular lands, he must specify the number and kind of the trees planted on those lands. I therefore think that the affidavit, with regard to this third planting, is defective in not specifying how

many trees were planted on one denomination, how many on another, the object of the statute being to enable the owner of the land to see how many trees were planted on his property.

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A similar objection has been made to the first planting; and the affidavit is defective on the grounds I have adverted to. The variance between the affidavits in the plantings No. 1 and 3 is, that in No. 3 the lands are held under a different landlord, but in No. 1 under the same landlord, but under different tenures; and it does not appear what those tenures are—they may be for life or for years. I therefore think that the same objection for uncertainty is equally applicable to both.

I therefore am of opinion that judgment should be given for the plaintiff as to No. 1 and 3, and for the defendant for the remainder.

PERRIN, J.

Upon the main and important question, I concur with my Brother MOORE. The Acts of Parliament are certainly very vaguely drawn, and there is a good deal of difficulty in reconciling their provisions; but we have no right to narrow these enactments. The object of these statutes was not so much to regulate the relations of landlord and tenant, or the relations of tenant for life and remainderman, or inheritor, as to encourage the planting of trees generally; therefore where the words of the statute are sufficiently large to warrant us in saying that the affidavit might be made by any one cognizant of the facts, I see no authority in the Court to confine it to any particular species of tenant.

With respect to the other objection, arising on the clause providing that it should not relate to trees planted under a covenant, it is quite plain that where a party has bound himself under a covenant, he ought not, in derogation of that covenant, entitle himself to the trees.

With respect to the first planting, I cannot bring myself to think that, when trees are planted on lands held under different demises from the same landlord, the tenant is deprived of his right to the trees because of his not specifying the number of trees planted on each denomination. I find no words in the statute to deprive him of

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that right. If the denominations of land were under the same lease, there could be no question.

With respect to the third planting, I feel very much embarrassed; and with considerable doubt I hold, upon that planting, that the plaintiff is entitled to recover.

CRAMPTON, J.

Upon the main question in this case—namely, whether the affidavit should be made by the party registering, or whether it may not be made by his agent, I agree with my Brothers MOORE and PERRIN. We have before us no evidence of what the usage in this respect has been, and therefore we can have no assistance in forming our judgment from the practice pursued as to such affidavits. It would be very unsafe to yield to the argument that we should, in construing a statute, attach any weight to the marginal noting in the printed statute book. We must therefore look to the sound construction of the statute itself, upon which the question arises, viewing it as one of a code or series of statutes intended to encourage planting, and to benefit all classes of tenants having limited estates.

The question arises upon the construction of the statute of the 23 & 24 G. 3, c. 39, an Act which, according to high judicial authority, ought to receive a most liberal construction in favour of tenants.

Now first, it is to be observed that there are several consecutive statutes on the subject of planting, and that these form one code of law, the 23 & 24 G. 3, c. 39, being only an amendment of the previous Acts, which had proved ineffectual for their purpose. These statutes are all *in pari materiâ*, and should be read together. The object of the Legislature in making these enactments was to encourage the planting of timber trees, and they give valuable privileges to certain classes of tenants, which are specially enumerated, namely, tenants for life, jointresses, tenants in tail, and remaindermen by settlement or otherwise, as well as tenants by lease; the object being to encourage planting, by giving to the classes therein enumerated a personal interest in the timber which they might plant. The 9 G. 2, c. 7, furnishes an illustration of this. By that statute no registry was required; but there was a proceeding by which a tenant for life

and remainderman were enabled to have their rights ascertained and decided, when they had made improvements by planting. They were given thereby a right to acquire the property in the trees without a formal registry, by a proceeding in the Court of Chancery. Then came the 5 *G.* 3, c. 17. The right to trees planted was by that Act extended to tenants having terminable interests, with certain rights of the landlord over them. In the 2nd section of that statute, the very same classes of tenants, and in the same order, are enumerated, as in the 1st section of 23 & 24 *G.* 3. All these classes are entitled to the trees they should themselves plant, according to the directions thereafter mentioned—the only condition imposed on them being, that by the 3rd section they are bound to register—[Reads the section].—The words “each person so planting” are comprehensive, including all the classes enumerated in the previous section. They are all required to register, not by affidavit, but by certificate, under the hand of the tenant, lodged with the Clerk of the Peace. Now, the term “tenant” is used there in a *generic* sense; it means persons planting, whether tenant for life, dower, &c., or by lease. These persons are to register by certificate *under their hand*. In this Act the word “landlord” is sometimes used, sometimes “reversioner.”

Then comes 23 & 24 *G.* 3, c. 39. This substitutes registry by affidavit for registry by certificate. Though it modifies, it does not totally repeal, the former Acts; the necessity for registry remains, but the mode of registry is changed. The affidavit, for the purposes of registry, may be made, as it appears to me, by the agent, steward or manager, as well as by the tenant himself: by that construction the inconvenience which would be caused by the other construction contended for would be avoided. The 1st section enumerates the same class of persons in the same words as in the 5 *G.* 3, c. 17; it gives them a right to cut the trees at any time during the term, but the 5 *G.* 3 limited that right to a particular year. The 2nd section of the 23 & 24 *G.* 3 is a *proviso* on the 1st section. It says:—“Any tenant (still using the same generic term) so planting, “or causing to be planted, shall, within twelve months after *such* “planting (that is, planting in his character of tenant for life, or

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“lives, &c.) *lodge* with the Clerk of the Peace of the county, &c., “an affidavit reciting the number and kinds of trees planted, and “the name of the lands, in form following.” It uses the terms shall *lodge* an affidavit, not shall make an affidavit, thus making the provisions more favourable to the tenant. The 5 G. 3 required the certificate to be under *the hand* of the tenant. Inconveniences might arise, from unavoidable absence or other causes. The 2nd section accordingly provides for such cases; for it says, the tenant is to *lodge* with the Clerk of the Peace *an affidavit*, not to make an affidavit, or to lodge an affidavit made by the party himself. No question could possibly have arisen upon this enactment, were it not that the form of the affidavit to be made is subjoined, and that such form imports that the affidavit is made by the tenant. Now is that form to override and overrule the previous positive enactment? Is it so stringent, binding and coercive in its character as is contended for? It might perhaps be so if “the form” was applicable to every case and class; but manifestly it is not, and it must be moulded to meet particular cases. The affidavit is by the enactment to be “in form following.” There is a distinction to be observed, and even noted in our books, between the legal terms “tenor” and “form” and the setting out of an instrument according to the tenor, or according to the form. Tenor has a stricter sense than form. In the former case an instrument must be set out *in hæc verba*, but where a form is to be pursued the same strictness is not required. I therefore take the subjoined “form” to be a model to be moulded so as to suit all the different classes for whose benefit the Act was passed, than a rigid unbending formula from which no departure was to be allowed. We must mould this form in order to admit tenants for life, remaindermen and others; the “form,” in its strict terms, will only apply to a tenant by lease. Thus construing the statute, we remove all difficulty; otherwise we are driven to repeal the 1st section, as to all classes of tenants, save that to which the form literally applies.

Then arises a second question, whether the one affidavit may include different denominations of land on which the trees are planted, for the purpose of registry? The 2nd section only says, that the affidavit shall recite the number and kinds of the trees

planted, and the name of the land. In registry No. 1, this is complied with; and I agree with my Brother PERRIN, although subject to some doubt, that this registry is on the whole sufficient.

As to registry No. 3, the question is much more embarrassing—that is, where parties hold under different landlords. I think it the safer course, where there are different landlords, that there should be separate affidavits and registries: and that I believe is the course the Legislature intended should be taken.

I therefore think that judgment should be given for the plaintiff as to No. 3, and for the defendant as to the other registries.

LEFROY, C. J.

In this case I should feel great difficulty in adhering to my own opinion, which differs from that of the other members of the Court, if it were not supported by an explicit opinion, of great authority, upon the construction of this Act, differing altogether from that of my Brethren. In the case of *Galwey v. Baker (a)*, Lord Cottenham says:—"The Acts in question altered the Common Law as to the right of lessors to the trees growing on their estates, such trees having been planted by the lessee, and he being required to register them *according to certain forms provided in the Act.*" And having read the 1st and 2nd sections of the statute 23 & 24 G. 3, c. 39, he proceeds thus:—"The 2nd section declared the general title of the lessee to the timber; and the 7th section provided that he should be permitted to sell all his right and property in the trees so by him planted; and the 21st section provides that nothing therein contained shall be construed to extend to any trees to be planted in pursuance of any covenant to that effect." Again, Lord Cottenham says:—"The 2nd section, and indeed all the provisions of the statute, seem to establish that the property in trees planted by the lessee, *and duly registered*, shall be vested in him; but it is clear that he may dispose of such property if he thinks fit." It would appear from these observations that Lord Cottenham considered this Act as regulating the rights of lessee and lessor, and those only, and as containing all the provisions by which these

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respective rights were to be decided. In my opinion, we are not now called upon to decide what are the rights of a tenant for life, tenant in dower, or by the courtesy or jointure, or of those other persons enumerated in the 1st section of the statute, nor whether they are to register or not—or if they are to register, in what form they are to do so ; but we are called upon only to decide the rights of the lessee as between him and his lessor.

The case has been argued upon the assumption that all the other parties were to register under the provisions of this Act, and as the form of the affidavit was not suited to their case, it should be moulded in their instance ; and consequently that the form was not essential, and might be departed from in the case of a lessee. But can this afford any sound reason for departing from a form adapted in every particular to the case of a tenant where no such necessity exists ? or is the departure from the form given by the statute, by substituting the affidavit of another person in place of the tenant's, a mere departure in form ? Was it not a matter of importance to the landlord to have the pledge of the person to whom he had entrusted his land for the truth of the affidavit ? I confess it appears to me that this Act is nothing else but an amendment of the law as between landlord and tenant, properly so called ; and that it was not intended to extend to the other persons named in the 1st section, although this case has been argued as if they were its principal objects, and as if it should receive its construction in reference to them ; whereas the whole scope, as well as the special wording, of the Act, seems to demonstrate the contrary. There may also have been very good reasons for making the distinction which appears to be made by this Act, between these other persons and tenants holding under leases : the former were enumerated ; they are only entitled to cut down the trees during the subsistence of their interest in the land, whereas a tenant holding by lease had a privilege for a year after the expiration of his lease to enter upon the land and cut down the trees planted by him. It might therefore be deemed reasonable to guard this right by more stringent provisions than were applied to any others.

Let us look now to the provisions and wording of the Act which

seem to favour this construction. There is first the recital in the preamble:—"Whereas the laws for the encouragement of tenants to plant timber trees have proved ineffectual;" then comes the proviso in the 2nd section:—"Provided always that any *tenant* "planting, or causing to be planted, shall, within twelve months, "lodge with the Clerk of the Peace an affidavit containing the "number and kind of the trees planted, *in form following* :—"I, "A B, do swear &c., that I have planted *on the lands held by* "me from — &c., and that I have given notice to *the person* "under whom I immediately derive &c., and also given notice "to the head-landlord," &c., &c. All these particulars exclusively applying to the case of a lessee or tenant, strictly so called.

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The change also in the wording of this proviso, as compared with the wording of the corresponding proviso of 5 G. 3, c. 17, is most observable: in that Act the words are—"each *person* so planting;" in 23 & 24 G. 3, c. 39, the words are—"every *tenant* so planting," singling out one of the whole class mentioned in the 1st section, namely, a tenant holding by lease, to whom there is a landlord to whom notice is to be given, as specified in the affidavit. On this part of the affidavit, it is worthy of remark, that where the Legislature intended the agent might be substituted for the landlord, they have said so expressly; which would seem of necessity to exclude such a substitution in the case of the tenant, on the principle *expressum cessare facit tacitum*.

It will be found, on a careful perusal of the Act, that there is not a single section applicable to any one of the enumerated classes except to that coming under the term "tenant," that is, a person holding by lease. The 3rd section uses the words "tenant as aforesaid," that is, a tenant who should register by affidavit in the form given by the 2nd section, which clearly applies in the terms of it only to a tenant holding under a lease.

Again, the 6th section, which provides against a fraudulent registry, gives a check only as between landlord and tenant—as clearly appears from the words at the beginning and at the end of the section. Now, if the purposes of the Act were to include tenants for life, jointress, &c., if they were bound to make a registry, why

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should they not be liable to the check provided against a fraudulent registry by a tenant?

Section 7 then provides that any tenant may sell his or her right title or property in said trees or coppices, or any part of the same, to any person under whom he or she may derive mediately or immediately; and that the person so purchasing may have all the rights, titles and properties and privileges therein, which are by this Act secured to the tenant. Here again is a distinction between tenants and other persons, showing the true scope and object of the Act.

Then comes the 8th section, which can apply to no other possible case than that of landlord and tenant; and the 9th section cannot apply to tenants for life, jointress, &c.; it is confined to a tenant holding under a lease. He is to have the right to cut the trees during the term in like manner as given to others; but beyond this he is to have, after his term has expired, where it is uncertain, one year further. The 10th section defines what a reversioner is, within the meaning of the Act, and specifies the notice he is to give to the tenant of his intention to purchase the trees, showing that he is to be the reversioner expectant on the expiration of the tenant's lease, not a remainderman. I may make the same observations respecting the other sections.

If then there be not any section in the statute after the 1st, applying to any person but a lessee, and if there be a form applicable to such lessee, are we to say that such lessee is not to abide by that form because there are other parties whom that form does not suit, and as to whom, because it does not suit their case, if they are to register, there may be a necessity to alter it? but there is none as to a tenant; and the words as to him are express that he shall register in that form.

Lord Cottenham says that the Act should be construed liberally, and I admit it ought, so far as the law will allow; but I cannot expunge plain words, and introduce others not in it.

It is said that this will disqualify infants and lunatics from planting, unless they are allowed to verify the affidavit by an agent; but how could they plant by an agent when they could not appoint one? However there is nothing to imply that the Legisla-

ture meant to include them. The Statute of Wills says every person seised in fee shall make a will; but that does not include infants and lunatics. For these reasons, I feel myself constrained to come to the conclusion at which I have arrived.

Upon the covenant there is no question whatever; the objection is quite untenable.

On the other objection, where the planting has been made on land held under different landlords, and the tenant has lumped the registry, I cannot hold that a good registry; but if a tenant hold two denominations under the same landlord by separate leases, I should say the registry would be good, although he did not enumerate how many trees were in one denomination and how many in the other, provided the leases expired at the same time. No inconvenience or mischief could arise in that case. I should therefore hold that registry good, for it would come within the terms of the affidavit. In any such case I would give the Act a liberal construction, and I would go to the utmost length of interpretation the words would admit, but no further. But the first planting not being consistent with the case I have put, judgment, I think, as to that planting, must be given for the plaintiff.

The Court being equally divided on this last question, Judge CRAMPTON acceded *pro forma* to the opinions of the CHIEF JUSTICE and Judge MOORE, to enable the parties to bring the case before the Court of Error.

Judgment was accordingly entered for the plaintiff upon the first and third plantings, and for the defendant upon the remainder.

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JOHN WARD v. W. D. FREEMAN.

(*Error from the Court of Queen's Bench.*)

April 21, 22.

No action will lie against a Judge of a Court of Record for any act done by him in the exercise of his judicial functions.

CASE.—The declaration stated that the defendant, before and at the time of the hearing of the cause thereafter mentioned, to wit, on &c., at &c., and from thence hitherto hath been, and still was, Assistant-Barrister for the county of Galway, duly nominated and appointed; that theretofore, to wit, on &c., at a General Session of the Peace holden at Galway, in and for the county Galway, before

Where in an action on the

case, brought by the defendant in a civil-bill against an Assistant-Barrister for refusing to take the affidavit of his attorney in a suit in which a decree had been made against him, and for refusing the recognizance of himself and his sureties, in order that he might prosecute an appeal, and for refusing to take his appeal, and to stop all proceedings on the decree; the plaintiff gave evidence to support this case, and further that he had performed all the necessary preliminaries entitling him to tender this affidavit; that the civil business of the Assistant-Barrister had ceased on the day previous, and that on the day he tendered the affidavit to the Assistant-Barrister he was occupied in transacting Crown business, and that on the evening of that day, as the Assistant-Barrister was about leaving the Bench, he tendered the affidavit and appeal, and that the Assistant-Barrister refused to receive the appeal, assigning no reason. At the close of plaintiff's case the defendant's Counsel called on the Judge to nonsuit, or direct a verdict, on the ground that the defendant, being a Judge of a Court of Record, and acting judicially, was not liable in such action. Counsel for the plaintiff insisted that the refusal to receive the appeal was not a judicial act, and required the Judge to leave the case to the jury, and to direct them to find for the plaintiff. The Judge refused to leave any question to the jury, but directed them to find for the defendant, being of opinion that the defendant, acting as a Judge of a Court of Record, was not liable to an action, and the jury found accordingly.

Held, that this was a mistrial, and that a *venire de novo* should be awarded: evidence having been gone into by the plaintiff proving all the averments in his declaration, the Judge was bound to leave the case to the jury, although he was of opinion no cause of action was disclosed in the declaration.—[LEFROY, C. J., MOORE, J., and GREENE, B., *dissentientibus*.]

Held, per LEFROY, C. J., CRAMPTON, J., MOORE, J., and GREENE, B., that the Assistant-Barrister, acting as a Judge of the Court of Record, in refusing to receive the appeal, acted judicially, and was not therefore responsible in an action for such refusal. *Sed per* MONAHAN, C. J., PIGOT, C. B., TORRENS, J., and PERRIN, J., the defendant in so doing acted ministerially.

* PENNEFATHER, B., and RICHARDS, B., *absentibus*.

divers Justices of our Lady the Queen, assigned to keep the peace in and for the said county, and to hear and determine, &c., a certain Court of our Lady the Queen, commonly called a Civil-bill Court, was held in and for the division of said county called the division of Galway, by and before the defendant, then and there being such Assistant-Barrister ; at which Court a certain cause by English bill or paper petition, usually called a civil-bill, in which cause one Thomas Cummins was plaintiff, and the now plaintiff was defendant, in a certain action of assumpsit, to wit, an action for the sum of £2. 1s., for goods sold, being a cause of action within the jurisdiction of the Court, was heard and determined by the Court ; and the now plaintiff was at the time of the service of the civil-bill resident within the jurisdiction of the Court, to wit, at &c., and that having been duly served with the civil-bill, then and there at the Court duly appeared by his attorney, to wit, C. R., and defended the action ; that thereupon such proceedings were had, that it was ordered and decreed by the Court that Thomas Cummins should recover from the now plaintiff the said sum of £2. 1s., together with six shillings costs (setting out the decree), as by the record of the Court might appear.

The declaration further stated that after the pronouncing of the decree, and before it issued, to wit, on &c., the now plaintiff, having just grounds of appeal from the decree, and then and there thinking himself aggrieved, and being in fact aggrieved by the decree so made and pronounced, intended and was desirous of appealing therefrom to the Judges of Assize for the county of Galway, at the Assizes next after the decree had been made and pronounced. That the plaintiff afterwards, to wit, on &c., paid to A. D., the attorney in the cause for Thomas Cummins, the sum of six shillings, the amount of the costs of the decree, of which the defendant had notice ; and that thereupon afterwards, and during the Court, and before the issuing of the decree, to wit, on &c., the now plaintiff tendered and offered to the defendant to enter before him, so being Assistant-Barrister, into a recognizance of double the sum decreed against him, to wit, the sum of &c., with sufficient bail, to wit, R. L. and T. D., with a condition to said recognizance to the effect following, &c.

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(setting out the condition). That R. L. and T. D. were, and each of them was, sufficient bail in that behalf, and were ready and willing and offered to enter into the recognizance, and the plaintiff then and there tendered and offered the defendant to appeal from the decree to the then next Justices of Assize; and C. R., being the attorney who so appeared for the plaintiff on the hearing and determination of the cause, was willing and offered the defendant to make an affidavit in writing before him as Assistant-Barrister, that the appeal was not, as he believed, made for the purpose of delay, but that there was probable cause for reversing the decree so made and pronounced. That the plaintiff then and there requested the defendant, so being such Assistant-Barrister, to take the affidavit of C. R., and that C. R. should be sworn to the truth of his affidavit, and to accept and take the recognizance and acknowledgment thereof by the plaintiff and his sureties, in order that he might prosecute his appeal to and before the Judges, &c., according to the form of the statute in that case made and provided, and to receive the appeal of the plaintiff from the decree.

That although it was the duty of the defendant, he being such Assistant-Barrister, to have taken the affidavit of C. R., and swear him as to the truth thereof, and also to have accepted and taken the recognizance, and to receive the appeal, and thereupon to have stopped all proceedings on the decree; and although the plaintiff was willing and offered to pay all fees in respect of the taking of the affidavit, recognizance and appeal, nevertheless the defendant, not regarding the statute in this case made, &c., nor his duty in that behalf, but contriving and wrongfully intending unjustly to aggrieve and oppress the plaintiff in that behalf, and to prevent and hinder him from appealing from the decree to the Judges, &c., and not regarding his duty as Assistant-Barrister, or the statute in that case, &c., and the laws of the land, absolutely refused to take the affidavit of C. R., or to swear him to the truth thereof, or to take the recognizance, or the acknowledgment thereof, or any other recognizance or affidavit whatsoever, for the purposes aforesaid, or to receive the appeal, or to stop the proceedings on the decree so pronounced: and for want of said appeal the decree afterwards, to wit

at the said Court, issued forth of the Court, then and there marked for the sum of £2. 1s., and costs, and signed by the defendant as such Assistant-Barrister, and by one J. R., then and there being Clerk of the Peace of the county, having been then and there entered and registered in the book kept by the Clerk of the Peace of the county for entering and registering of causes decreed and determined by the Court by English petition or paper bill; by means of which premises the plaintiff was deprived of his appeal and of the benefit and advantages thereof, and precluded and hindered from procuring the decree to be reversed, as he could and might have done but for the committing of the grievances by the defendant.

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The declaration then alleged that the Sheriff of the county issued his warrant, empowering persons therein named to execute the decree, and that certain goods of the plaintiff were seized in execution; and that plaintiff, in order to prevent a sale thereof, paid the amount of the decree and the costs to the plaintiff in the civil-bill, and that thereby plaintiff was then and there greatly exposed and injured in his credit and circumstances.

The defendant pleaded the general issue.

The case was tried before MOORE, J., at the Spring Assizes of 1851, for the county of the town of Galway, and the first witness produced for the plaintiff was his attorney in the civil-bill proceedings, and also his attorney on the record. He deposed that the defendant was, and for several years had acted as, Assistant-Barrister for the county of Galway and county of the town of Galway, and acted in that capacity in the month of January 1851. That the sessions commenced at Galway on Friday the third day of January 1851; that he acted as attorney of the plaintiff in this action, who was defendant at said sessions in a civil-bill for £2. 1s., brought by Thomas Cummins, for a pig sold. That witness appeared to defend that civil-bill for the present plaintiff, and produced evidence for the defence, and pressed it on the defendant, and pointed out the hardship, and defendant said he did not care. Witness then produced a printed notice, which stated that the grand jury was to be sworn on Friday; and he deposed that after that was done the civil-bill business was gone into, which lasted until some time on

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Saturday; that the criminal business from thence continued to Monday; that the mode of lodging an appeal is by preparing the recognizance and affidavit, which was done in open Court, as the practice was; that he paid Anthony Donnellan, the attorney for the plaintiff in said civil-bill, the costs of the decree, being six shillings; that he applied on Monday to Richard Carter, the Deputy Clerk of the Peace, to take the appeal; that the Crown business was then going on, and Carter said he had directions from the Barrister not to take an appeal while the Crown business was going on; that witness applied in open Court to the defendant on Monday evening to take the appeal; that the Court was then sitting, and defendant on the Bench; that he had the recognizance prepared, with the names of parties and sureties, also the affidavit filled and ready to be sworn; that the sureties were present; that defendant refused to receive the appeal, but assigned no reason; that no proclamation had been made before witness made the application to defendant; that the defendant very soon left the Bench; that the decree obtained against the plaintiff was given out, and that witness paid the amount, £2. 12s. 1d., to the plaintiff in the decree, and that the receipt was on the back of the process. That he had lodged appeals after the criminal business was ended, and which were received by the defendant, and that he had done so at the identical sessions of January last, and that it was tried at the present Assizes.

On his cross-examination he deposed that it was between five and six o'clock in the evening that he applied to the defendant to take the appeal; that the book had been ruled, and the Crown business all finished; that the whole of the civil-bills had been disposed of between eleven and twelve o'clock on Saturday; that he had lodged other appeals on Friday; that he had paid the six shillings to Mr. Donnellan's clerk, Mr. Carey, on Monday morning; that when witness pressed the defendant to take the appeal, he hastened off the Bench as fast as he could; that the witness had not got any money from the plaintiff for this action; that he had paid Counsel's fees; that he had received instructions from plaintiff by post; that he could not say whether he gave the affidavit to the Deputy Clerk of the Peace when he called on the defendant to

take the appeal; that witness did not mention the names of the parties to the defendant when he asked him to take the appeal. A printed document was then shown to witness, and he deposed that he had sent the manuscript for same to the printer; that he had not then had instructions; that he sent a letter on Monday morning to the defendant, and that it was returned with an answer from the defendant; that witness sent a second letter next day to the defendant, and got an answer. That the defendant left Galway on the seventh for the next town.

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Thomas Walsh also deposed that he was an attorney practising at sessions for twenty or thirty years; that the practice had been to take the appeals as long as the Barrister was sitting, though after the criminal business; and William Joyce gave similar testimony.

Evidence was also given by Roger Lynskey, that he had attended for the plaintiff in the appeal; that the goods of the plaintiff were seized under the decree, and that the money was paid. The signature of the decree by the Sheriff was also proved, and the process, decree, recognizance and affidavit, as stated in the declaration, were then read, and the plaintiff closed his case.

Thereupon Counsel for the defendant called upon the learned Judge either to nonsuit the plaintiff, or if he would not consent to be nonsuited, then to direct a verdict for the defendant, inasmuch as the defendant, as such Assistant-Barrister, was a Judge of a Court of Record, and that in refusing to receive the appeal, he had acted judicially; and therefore no action for such act was maintainable against him. Counsel for the plaintiff then and there insisted that the refusal of the defendant to receive the appeal, as aforesaid, was not a judicial act; and also then and there called upon and required the learned Judge to leave the consideration of the said case upon the evidence to the jury; and called upon and required him to direct the jury that, if they believed the evidence given upon behalf of the plaintiff, they ought to find a verdict for the plaintiff. But the learned Judge refused so to direct the jury, or to leave the consideration of the evidence so given upon the part of the plaintiff to the jury; but directed the jury to find a verdict for the defendant, expressing his opinion to be, that the defendant, acting as a Judge of a Court of

E. T. 1852. *Record*, was not liable in the present action for the breach of duty in the plaintiff's declaration alleged to have been committed by him: to which opinion and direction of the learned Judge, Counsel for the plaintiff objected, and did then and there except.

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The jury, by the direction of the Judge, found a verdict for the defendant. Whereupon the Counsel for the plaintiff excepted to said direction and ruling of the learned Judge.

The bill of exceptions was argued in Michaelmas Term 1851, when the exceptions were overruled, and judgment given for the defendant (a).

On this judgment a writ of error was brought, and the following points were noted for argument :—Whether the defendant was liable to an action for refusing an appeal from a decree pronounced by him as an Assistant-Barrister? Also that the act complained of was not a judicial act, and that the refusal to take the affidavit and appeal was not a judicial act, even though a refusal for insufficient bail, or any such cause, might be so considered.

Meagher and *Lynch* were heard on behalf of the plaintiff, and—

The *Attorney-General* (Napier), *Fitzgibbon* and *Concannon*, for the defendant.

Cur. ad. vult.

T. T. 1852. The Court, differing in opinion, delivered judgment *seriatim*.
May 26.

GREENE, B.

This case comes before the Court on a writ of error, brought to reverse a judgment of the Court of Queen's Bench. His Lordship, having stated the pleadings and the facts, proceeded to say :—

The opinion given by the learned Judge at the trial, and against which the exception was taken, was, that under the circumstances the refusal of the defendant to receive the appeal was in its nature a judicial act. The only question raised by this exception

(a) 1 Com. Law Rep. 677.

is, as I understand it, whether in that opinion he was correct in point of law, or not?

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It has been argued that the learned Judge below misconceived the law, inasmuch as the rejection of the appeal by the Assistant-Barrister was a refusal to discharge a duty purely ministerial, imposed upon him as a ministerial officer by the provisions of an Act of Parliament; and therefore that even supposing an action not to lie against an Assistant-Barrister for any thing adjudicated on by him, yet, in the present case, the defendant is liable for the act complained of in the declaration. I cannot concur in this view of the case.

It is a principle of law, established from the earliest times, that the acts of a Judge of a Court of Record, if within the limits of his jurisdiction, are not to be reviewed or questioned in an action brought against him. This principle is most important, as regards not only the Judge, but the general interests of justice, and ought not to be impaired or frittered away on light or subtle grounds or distinctions. One of the principal cases bearing upon this subject is *Floyd v. Barker (a)*. In that case a charge of conspiracy was brought against the Judge who tried the case, and the Court says:—"Although the offender upon the indictment be acquitted, "yet the Judge, be he Judge of Assize, or a Justice of the Peace, "or any other Judge, being Judge by commission, and of record, "and sworn to do justice, cannot be charged for conspiracy, for "that which he did openly in Court as Judge or Justice of Peace; "and the law will not admit any proof against this vehement and "violent presumption of law, that a Justice sworn to do justice will "do injustice; but if he hath conspired before out of Court, this is "extra-judicial; but due examination of causes out of Court, and "inquiring by testimony, *et similia*, is not any conspiracy, for this "he ought to do." And again:—"And as a Judge shall not be "drawn in question in the cases aforesaid, at the suit of the parties, "no more shall he be charged in the said cases before any other "Judge at the suit of the King. And for this, in the 27 *Ass.*, "pl., 18, one was indicted and arraigned at the suit of the King,

(a) 12 Rep. 24.

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“that as he was a Justice of *oyer* and *terminer*, where certain
 “persons were indicted of trespass before him, he made an entry
 “of record that they were indicted of felony; and it was adjudged
 “that this indictment was against the law, for this, that he was a
 “Justice by commission; and that is of record; and this present
 “act shall be to defeat the record, *hoc est*, to aver against that
 “which he did as a Judge of Record, which cannot be by the
 “law. And it was said, that it was the case of one Nudigate,
 “who as a Justice of Peace had recorded a force upon a view,
 “which he did as a Judge upon record; and a bill was exhibited
 “against him in this Court, for this, that he had falsely made a
 “record, where indeed there was not any force; and by the
 “opinion of Catlyn and Dyer, Chief Justices, it was resolved,
 “that the thing that a Judge doth as a Judge of Record ought
 “not to be drawn in question in this Court.” And again—“And
 “the reason and cause why a Judge, for any thing done by him
 “as a Judge, by the authority which the King hath committed
 “to him, and as sitting in the seat of the King (concerning his
 “justice) shall not be drawn in question before any other Judge
 “for any surmise of corruption, except before the King himself,
 “is for this:—the King himself is *de jure* to deliver justice to all his
 “subjects; and for this, that he himself cannot do it to all persons;
 “he delegates his power to his Judges, who have the custody and
 “guard of the King’s oath.”

So in the case of *Barnardiston v. Soame* (a), it is laid down that
 “No action will lie against a Judge for what he does judicially,
 “though it should be laid *falso malitiose et scienter*. They who
 “are entrusted to judge ought to be free from vexation, that they
 “may determine without fear; the law requires courage in a
 “Judge, and therefore provides security for the support of that
 “courage.” And in *Grocenvelt v. Burwell* (b) it was held, that
 no action lay against the Censors of the College of Physicians,
 because they were Judges of the matter, and what they had ad-
 judged was not traversable. The same case is reported in 1 *Lord*
Raymond, p. 468, where it is said that a Judge shall not be ques-

(a) 6 St. Tr. 1096.

(b) 1 Salk. 397.

tioned at the suit of the parties. The rule is thus stated in *Hamond v. Howell* (a):—"An action will not lie against a Judge, for any thing done by him *quatenus* a Judge." I may refer, in support of the same principle, to the judgment of the Judges in the case of *Taaffe v. Downes*, as reported in the note to 3 *Moore's P. C. Cases*, pp. 45, 46, 51, 53, 58, 60. In *Garnett v. Ferrand* (b), Lord Tenterden deduces from the preceding cases this rule, that "no action will lie against a Judge of record for any matter done by him in the exercise of his judicial functions."

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I do not think indeed that the Counsel for the plaintiff argued that an action would lie against a Judge of a Court of Record for an act done by him as Judge. It seemed to me to be conceded, that in such a case no action could be maintained. The argument in support of the exception was that the act complained of in the declaration was done by the defendant not in his character of Judge, but in one altogether ministerial. We must see therefore what is the act complained of, what it is alleged that he was called upon to do, and what he is charged with having refused to do.

The ground of action in the present case is the refusal to receive an appeal from a civil-bill decree pronounced by the Assistant-Barrister, the consequence of which was the issuing of the decree and the seizure of the plaintiff's goods thereunder. Now it cannot be contended that the right to have an appeal received is an absolute right; it is only conditional, founded on the performance of certain requisites pointed out by the statute which gives the appeal; amongst others, the making of an affidavit that the appeal is not intended for delay. It is contended that the Assistant-Barrister, if he had received this affidavit, must have been considered, in that particular, as acting ministerially; that he had consequently no discretion to exercise as to the taking or refusing it, and therefore that the learned Judge was mistaken in saying that the Assistant-Barrister, when he refused to receive the appeal, was acting not ministerially, but judicially. But I do not think that the plaintiff in error can be allowed thus to pick out, from the whole of the proceedings constituting the right to appeal, the single ingredient of the taking of the affidavit,

(a) 2 Mod. 218.

(b) 6 B. & C. 625.

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discarding from consideration the other matters necessary to create that right. It does not appear either in the pleading or upon the evidence that the recognizance in the present case had been taken, or that the Assistant-Barrister had decided on the sufficiency of it, or that nothing remained to be done but the swearing of the affidavit. I could understand this argument—that if every thing necessary to give the right to appeal had been complied with, save only the swearing of the affidavit, the refusal to administer the oath might be deemed to be the act of an officer merely ministerial; but it is the refusal to take the appeal with which the Barrister is here charged. To what description of officer, it may be asked, and in what capacity acting, did the attorney make the application to the Assistant-Barrister to receive this appeal? It cannot be denied that the person thus applied to was, when the application was made, a Judge of a Court of Record—that he was, as such, required to do the act, and that he could only as such receive the appeal. Nor can it, as I conceive, be contended that, when the application was thus made to him as a Judge, he had no discretion to exercise, nor any judicial functions to perform. It must be admitted that with regard to the amount and sufficiency of the recognizance, he had to discharge a duty (which was of a judicial nature) and to exercise a discretion which involved judicial decision. When an application of this nature is made to an Assistant-Barrister, it must be recollected that he is in truth required to adjudicate between the plaintiff and the defendant—between the latter as claiming the right to obtain a suspension of the decree, and the former as *prima facie* entitled to his execution. I am clearly of opinion that the application to the Assistant-Barrister to grant this suspension by receiving an appeal was one made to him as a Judge of a Court of Record, acting in the exercise of his judicial functions as such.

If he had received the appeal, it would have been unquestionably an act by him as a Judge, and acting as such; and I am at a loss to see why the refusal to receive it can be viewed in any different light. It is a refusal to do that which, if done, would have been a judicial act. It is the act of a Judge exercising jurisdiction in a matter involving judicial functions. Suppose the defendant or his

attorney applies to the Judge and says, "I wish to appeal," and the Assistant-Barrister replies, "I will not receive your appeal because it is too late," it could not be, and it has not been, denied that such refusal would be a judicial act done by the Barrister as a Judge, and therefore within the principle of that protection with which the law invests the judicial character. It was decided by the late Serjeant Warren, in the case of *Fox, appellant, King, respondent* (a), that no action could be maintained against a Seneschal for refusing to receive an appeal on the ground that it was too late, although the learned Serjeant was of opinion that the reason so assigned was insufficient to warrant the refusal. No legal authority can be cited entitled to greater weight than that of the eminent and lamented gentleman, who, after careful consideration, arrived at this conclusion. If then the refusal to receive an appeal, accompanied by a reason which is insufficient, be not the ground of an action, because the person complained of was acting judicially, it is difficult to conceive how the nature of his act can be affected by his omitting, as in the present instance, to assign any reason for his refusal. Why is an act, which, if a bad ground be alleged, would not be assailable, to be open to impeachment simply because no reason has been assigned for it?

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There is another principle applicable to this case, which is, that if any portion of the thing complained of partake of the nature of a judicial act, it will bring the matter within the protection of the rule, even though other matters may be connected with it which would not be strictly judicial. That principle is established in *Linford v. Fitzroy* (b). That was an action brought against a magistrate for refusing to accept bail from a party charged with an assault. Lord Denman, in giving judgment, says:—"It was contended that if the amount of bail, and the ability of the persons tendered was ascertained, the act of admitting to bail became ministerial only. But upon the fullest consideration we are of opinion that the duty of the magistrate in respect to admitting to bail cannot be thus split and divided; that it is essentially a judicial duty, involving inquiries on which discretion must be

(a) 3 Cr. & Dix, 38.

(b) 13 Q. B. 245.

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“exercised—and in some cases of misdemeanour, discretion under
 “circumstances of much nicety, and that we cannot lay down a
 “rule which is to depend upon the peculiar facts of each case. The
 “broad line of distinction is this:—that unless the duty of the magis-
 “trate is simply and purely ministerial, he cannot be made liable to
 “an action for a mistake in doing or omitting to do any thing in
 “execution of that duty, unless he can be fixed with malice, which
 “in this case has been negatived by the jury.” It is impossible to
 allege with any truth that the act, which was the ground of this
 action, did not partake, to some extent at least, of a judicial cha-
 racter; nay more, that it was not essentially judicial. The Act of
 Parliament no doubt requires the Judge to receive the appeal, and
 stop the proceedings, but it also prescribes requisites of the perform-
 ance of which he must satisfy himself before he does so. Under
 the circumstances disclosed in this case, it appears to me that the
 defendant was acting as a Judge when called on to receive the
 appeal, and at the time when he refused so to do; and that the
 act complained of not only partook of, but was essentially in the
 nature of, a judicial act.

It is argued, however, on behalf of the plaintiff in error, that
 supposing and admitting the validity of the principle that a Judge
 is not answerable in any manner for acts done by him in his judicial
 character, yet here the judicial character of the Assistant-Barrister
 had ceased, that he had pronounced his decree, and that thereupon
 a new and distinct character was attached to him, the nature of
 which was merely ministerial. I cannot accede in point of law to
 that proposition. So long as the Assistant-Barrister continues to
 preside in the Civil-bill Court, his judicial office and character re-
 mains. It is in that capacity that he receives an appeal, or can
 receive it. As I understand the declaration of the plaintiff, there
 is no room even for the allegation in point of fact that in the pre-
 sent case the proceeding complained of took place after the character
 of Judge had ceased. It will not be denied that the signing the
 decree was a judicial act; he was then undoubtedly acting in his
 judicial character. Further, the plaintiff's attorney says that he
 applied to the defendant in open Court. What is the meaning of

that? It means that the defendant was sitting or presiding in open Court as a Judge, and that to him as such the application was made.

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For these reasons I am of opinion, upon the only question which, in my view of the case, was submitted to the learned Judge at the trial, that he was right in point of law in saying that the act in question was a judicial act.

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I now come to a question which has occurred to some of the Judges with reference to the duty of the Court on this record, and upon which, I confess, I had for a considerable time some difficulty as to what course I ought to pursue.

It is laid down in some of the authorities that if all the facts stated in the declaration be proved, and if there be no controversy as to those facts, but the Judge, before whom these matters of fact come for trial, is of opinion that these facts do not constitute a sufficient cause of action, or do not entitle the plaintiff to recover, he ought not upon that view of the law to nonsuit, or direct a verdict for the defendant; but that the proper course is to send the case to the jury—the proper functions of the jury being only to ascertain facts, and not to decide or determine on points of law; and the case of *Lumby v. Allday* (a), recognised in *Keenan v. Phillips* (b), is relied upon in support of that proposition.

It may be conceded that if this were an application to enter a nonsuit or direct a verdict, these authorities would apply. But I think that as this record is now brought before the Court by the plaintiff in error, asking a reversal of the judgment in the Court below, this Court is bound, upon such a writ of error, to ascertain and satisfy itself that there are errors clearly appearing on the record sufficient to justify them in reversing that judgment. Unless the Court see on the face of the record grounds for considering that an improper judgment has been given, they will not, as I conceive, be warranted in reversing it. Supposing then that I am right in saying that the opinion of the learned Judge at the trial was correct, it remains to be considered whether the judgment below ought to be reversed, by reason of the objection arising upon the authorities to which I have last referred?

(a) 1 Cr. & Jer. 301.
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(b) 5 Ir. Law Rep. 442.
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The duty of a Court of Error upon a bill of exceptions is, I apprehend, twofold, namely, to examine the validity of the exceptions, and adjudicate upon them; and besides and beyond this, though the exceptions should be disallowed, to inspect the whole record, and if they see matter, irrespective of the exception, which shows that the judgment is wrong, they are bound to reverse the judgment notwithstanding their opinion upon the exceptions. In *Lord Trimleston v. Kemmis* (a), Chief Justice Tyndal says:—"If the action had been brought in England, and, after a bill of exceptions had been tendered at the trial and allowed by the Judge, the proceedings had been removed by a writ of error, both the original record and also the exceptions tendered at the trial, together with so much of the evidence as related to those exceptions, and was necessary to enable the Superior Court to form its judgment thereon, would have been brought by such writ of error before the Superior Court. The Court of Error would in that case have a twofold duty cast upon it—it would have been the duty of the Court to decide upon the validity of the exceptions tendered at the trial, and to allow or disallow the same according to law; and it would also have been its duty, in case any errors appeared on the face of the original record, to examine such errors, and to reverse or affirm the judgment of the Court below as the law required. But the Court of Error would have no further duty to perform." The same view of the duty of a Court of Error was acted on in *Rutter v. Chapman* (b). Admitting it then to be the duty of the Court to take that course, I am of opinion that there is not any thing upon this record that would in this respect call upon this Court to pronounce a judgment of reversal.

As I understand the exception, and as the plaintiff's Counsel appear to have understood it, it is this:—that the defendant's Counsel called on the learned Judge to direct the jury to find for him, because this was a judicial act; that, on the other hand, Counsel for the plaintiff called on the Judge to leave the case to the jury, because, as they contended, it was not a judicial, but a ministerial, act. The question therefore submitted by both parties to the learned

(a) 9 Cl. & Fin. 770.

(b) 8 M. & W. 1.

Judge, and that upon which his opinion was sought, was, whether the refusal to receive the appeal was or was not a judicial act? It is plainly the duty of the suitor, if he means to quarrel with the decision of a Judge, to point out to that Judge distinctly the propositions to which he calls upon him to accede. If that be not done, the Act of Parliament giving the bill of exceptions has not been complied with. A question which has not been propounded to the Judge below, and as to which no opinion of his appears on the record, cannot be argued in the Court above. The rule is laid down by Lord Tenterden in *Ball v. Mannin* (a), where he says:—“Counsel intending to raise such objection should call upon the Judge to give more specific direction, that he may have an opportunity of correcting his error.” And in *Rutter v. Chapman* (b), Coltman, J., says:—“It is not open to the party objecting to the summing up of the learned Judge to take any other objection to it than that which he took at the trial.” And in p. 62, Williams, J., observes:—“Upon the first question, as there was a total disagreement in the course of the argument as to what actually was the direction of the learned Judge, I think it right to state at the outset that I certainly agree in the opinion with (I believe) the whole of my learned Brothers, that we are bound to look at what appears from the record to have been propounded to the learned Judge at the trial, his direction thereon, and the precise exception thereto, without noticing any other facts, or circumstances whatever.” And Patteson, J. (in p. 71), adds:—“At all events, the Court of Error is bound to look at the exceptions actually tendered, and to decide upon them only.”

Let us then consider the present case with reference to these authorities. It is said that as the rule of law is, that where the facts are not disputed, but the matter resolves itself into a question of law, the Judge below should not withdraw the case from the jury, and as that was the state of things at the trial, there should be a *venire de novo*. Now the proposition that, where the facts are proved, and the sole question is as to the right of the plaintiff to maintain his action, the duty of the Judge is to leave the case

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(a) 3 Bli. N. S. 22.

(b) 8 M. & W. 37.

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to the jury, notwithstanding his opinion that the action is not maintainable, appears to me to be a different one from that propounded to the learned Judge, as appearing on this bill of exception. One is a question whether, under the circumstances disclosed in the present case, a particular act was judicial or ministerial? The other is an abstract question as to the course to be pursued by the Judge at Nisi Prius, where the plaintiff has proved his facts, but has in law no cause of action. The two propositions are essentially distinct. The question argued at the Bar was, whether the act of refusing to receive the appeal was a judicial act? The other is, whether supposing it to be so, and supposing the Judge warranted in taking that view of it, he ought, nevertheless, to have sent the case to the jury, on the principle that has been laid down in the cases of *Lumby v. Allday*, and *Keenan v. Phillips*? I think that the latter point has not been put forward, as it ought to have been, in the exceptions. I consider the objections to relate only to the soundness of the opinion expressed by the learned Judge as to the nature of the act; and therefore I conceive that we are not now called upon to discuss that question, even should we be of opinion that the cases in 1 *C. & J.*, and 5 *Ir. Law Rep.*, apply, which I do not admit, because I do not consider that the matter was here in point of fact withdrawn from the jury. There being a judgment for the defendant, and the question now being whether that judgment is or is not agreeable to law, we must see that there is matter on the pleading, or put forward specifically by way of exception, to show it to be erroneous, before we can deprive the defendant of the benefit of his judgment. I am bound to say that I see no such matter on this record. To decide against the defendant, upon the second question to which I have adverted, would be, in my opinion, to allow a party to submit one point to the Judge at the trial, and argue another in the Court of Appeal; and, upon the whole, I am of opinion that, as this case went to the jury, with a direction by the learned Judge, which was correct in point of law, the judgment of the Court of Queen's Bench ought to be affirmed.

MOORE, J.

I concur in the opinion of my Brother GREENE, and in an ordinary case I should be satisfied to rest my judgment on the reasons

so clearly stated by him ; but as some members of the Court are of opinion there has been a mis-trial, and as the error, if it be one, originated with me as the Judge before whom the case was tried, and as the question involved is admittedly one of the utmost importance, I think it right to state, in some detail, my reasons for affirming the judgment of the Court of Queen's Bench.

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The question that will have to be decided, in some stage or other of the cause, is, whether the defendant, holding the office of Assistant-Barrister, is liable, upon the facts stated on this record, to have his conduct submitted to the consideration of a jury ? And that question appears to me to involve a principle most essential and important to those who are, or may be, intrusted with the administration of the law.

I shall first apply myself to the question of the alleged mis-trial. Some members of the Court consider that, as the plaintiff gave evidence of the facts stated in the declaration, the case should have been left to the jury, with a direction that if they believed the evidence, they should find for the plaintiff, even though it was clear that no cause of action was shown either in the pleading or proof. The proposition contended for is, that no matter how imperfect the facts stated in the declaration are, to show a cause of action, yet if the defendant pleads the general issue, it is the right of the plaintiff, if he proves those facts, to have a verdict, though it may be plain on the record that he can never have a valid judgment.

This proposition rests on the authority of the case of *Lumby v. Allday*, and upon the decisions in this country founded on it. In that case the rule is so laid down by Baron Bailey ; but no authority is cited for it, and certainly there are authorities the other way. In *Sadlier v. Robins (a)*, the action was one of special assumpsit, founded on a decree in the High Court of Chancery in the Island of Jamaica. The plea was the general issue. When the case was opened by the Attorney-General, Lord Ellenborough expressed his opinion that the decree set out in the declaration was insufficient to sustain the promise, and therefore that the action was not maintainable, and said he would nonsuit. The Attorney-General urged

(a) 1 Camp. 253.

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strenuously that the objection was on the record, and if well founded the judgment might be arrested. Lord Ellenborough said:—"If there is evidently no consideration to raise a promise, so that the action cannot be supported, why should the defendant be put to move in arrest of judgment? In many other cases, where it is clear the action will not lie although the objection appears on the record, and might be taken advantage of by motion in arrest of judgment, or by writ of error, Judges are in the habit of directing a nonsuit;" and accordingly he nonsuited the plaintiff: and it appears that the Court above unanimously held the nonsuit to be right, and one of the Judges in the King's Bench at the time was Bailey himself.

The next case is *Whitworth v. Hall* (a). That was an action on the case, for maliciously suing out a commission of bankruptcy, but the declaration did not state that the commission had been superseded: on the trial, Goulburne called for a nonsuit on that ground. Chief Baron Alexander, who tried the case, thought the objection fatal, but refused to nonsuit, thinking that the defendant ought to have demurred to the declaration; and he made the cause a remanet, in order to give the plaintiff an opportunity of obtaining a supersedeas of the commission before the next Assizes. In the following Term, Goulburne obtained a rule *nisi* for entering a nonsuit, and the Attorney-General showed cause, and contended that as there was good ground of demurrer, and the defendant not having demurred, that the Judge was right in refusing to nonsuit. Parke, J., said:—"If the objection was fatal, the Judge ought to have nonsuited the plaintiff." And by the full Court the rule for a nonsuit was made absolute. It is to be observed that this case was subsequent to *Lumby v. Allday*, and both of them had been tried before Chief Baron Alexander, who probably refused to nonsuit in the latter case in consequence of the rule laid down by Bailey in the Exchequer, in *Lumby v. Allday*. These two cases appear to me to be direct authorities in opposition to the rule laid down in *Lumby v. Allday*, and to be more consonant to reason and justice; for why should a plaintiff who has neither in pleading or

(a) 2 B. & Ad. 695.

proof shown a cause of action be entitled to a verdict, on which he never can be able to obtain a valid judgment?

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It has been argued as a reason for this rule, that the defendant ought to demur in the first instance, and not allow the plaintiff to go to the expense of a trial. I have always considered that a defendant has a right to dispute both the facts and the law relied on by his adversary. He may think that both are in his favour. If he demurs, he admits the facts to be true, though they may not be so. Why should he be driven to make such an admission against what he considers to be the truth? If on the trial, there is a verdict against him, he is entitled, if the law be with him, to arrest or reverse the judgment; and he is sufficiently punished for not having made the objection in the first instance by not getting his costs. I acknowledge that when the objection appears on the record, a Judge ought not, except in a very clear case, either nonsuit or direct a verdict for the defendant; but if the Judge is clearly of opinion that no cause of action appears on the pleading or in proof, I am unable to see any sound principle which is to prevent him from putting a final end to the case by nonsuiting, or directing a verdict for the defendant. And if he adopts either of those courses, and that the Court above agrees with him in the opinion that no cause of action was stated on the record, on what principle is it that a verdict consistent with the law is to be set aside, in order that on a new trial the plaintiff may have a verdict which, in the opinion of the Court above, can never be available for his benefit?

I would further refer to the case of *Dicas v. Lord Brougham* (a), in which Lord Lyndhurst, on the facts proved, considered that the action did not lie, and directed a verdict for the defendant. It is true that in that case the objection did not appear on the record, and could not have been made until the trial. But the imperfection of the pleading cannot aid the defect in proof; and if where the proof be defective in showing a cause of action, a Judge is right in directing a verdict for the defendant, can he be less right in so doing because the pleading is also insufficient? In the present case the proofs cor-

(a) 6 C. & P. 249.

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responded with the pleading, but I was of opinion they did not either separately or conjointly show any cause of action, and I thought the defendant was entitled to a verdict. The Court of Queen's Bench concurred in that opinion; and if that opinion was substantially right, and I believe several members of this Court are of that opinion, I cannot see any sufficient ground for saying that there has been a mis-trial.

Assuming however that the objection of a mis-trial does exist, it appears to me that it does not come within the scope of the exception taken. The point contended for by the defendant at the trial was, that the defendant was a Judge, and acted judicially, and therefore that no action was maintainable against him. Counsel for the defendant, on the other hand, contended that the refusal of the defendant to take the appeal was not a judicial, but a ministerial, act. It was never directly or indirectly submitted to the consideration of the Judge at the trial that he ought to take the course now contended for; but the single question submitted to him was, whether the act was judicial or ministerial? and if judicial, whether it was a defence to the action? And on this point alone did the Judge below express any opinion. I think it plain that the Counsel for the plaintiff never thought of this objection of a mis-trial, for it was never even adverted to in the argument either in the Queen's Bench or in this Court; and the statement of points to be argued is equally silent on the subject. In my opinion, the exception only raises, and was intended only to raise, the point submitted to the Judge below.

I have further come to the conclusion that this objection, if well founded, amounts to nothing more than an irregularity. I think the Court must decide, on this record, whether the act was judicial or ministerial? and if judicial, whether the judgment be right or not? It appears on the declaration and in proof that the defendant was an Assistant-Barrister, and the Court has judicial notice that as such he was a Judge of a Court of Record. The acts which the defendant is charged with having refused, or omitted to do, are also stated; and the Court has therefore on the pleadings materials to enable it to pronounce as to the nature of these acts,

and whether in point of law the action is maintainable or not? I am of opinion that the acts stated are judicial, and therefore that the action cannot be sustained; and I do not think we ought to set aside this verdict on the ground of this alleged mis-trial, if it be one, and grant a *venire de novo*, the effect of which would be to enable the plaintiff to obtain a verdict on which, in my opinion, no valid judgment could be had.

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But it has been argued that upon the authority of the case of *Lord Trimleston v. Kemmis*, the Court are coerced to set aside this verdict. That case does not, in my opinion, support that proposition, but is directly contrary to it. The Court of Error in that case passed by the bill of exceptions, and having discovered by a deed, which was the foundation of the plaintiff's title, that no legal estate had passed, they were of opinion the plaintiff had no title, and they pronounced judgment in favour of the defendant. The House of Lords decided that course to be wrong; and the ground upon which they disapproved of it was, that a Court of Error had no right to select a portion of the evidence, and found a judgment on it. But Chief Justice Tyndal (in p. 770) says:—"The Court of Error would have
 "a twofold duty cast upon it—to decide upon the exceptions, and
 "also, in case any errors appeared on the face of the original record,
 "to examine such errors, and to reverse or affirm the judgment of
 "the Court below as the law required." The objection here is, that the plaintiff has not shown any cause of action either in pleading or proof; and if we come to that conclusion, then any judgment for the plaintiff would be erroneous, and we would be bound to say that the judgment pronounced by the Court below is absolutely right. And is this Court to pursue the idle and useless course of reversing a judgment substantially good, and to grant a *venire de novo*, in order that the plaintiff might get a verdict upon which he never could have a valid judgment? I am for these reasons of opinion there has been no mis-trial—that the objection, if well founded, is not within the exception, and even if it was, that the judgment on the record is good.

It is necessary that I should advert to another point that has been raised—whether the action could be sustained if malice were averred and proved? It has been argued that although no malice

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was averred, yet that the facts indicate malice. It is not necessary to give an opinion whether, if malice were averred and proved, the action could be sustained; but it is only justice to the defendant to say that the existence of malice was distinctly withdrawn by Counsel at the Bar. It appears to me a clear and unquestionable proposition of pleading, that if malice were a necessary ingredient, it should be distinctly averred in terms in the pleading, and the want of such averment cannot be satisfied by any statement furnishing an inference of malice, however clear. The authorities establishing this proposition are collected in *De Medina v. Grove* (a). In the present case there is no averment of malice.

I now come to an important part of the case. It was contended at the Bar, and I am aware that it produced a strong impression on the mind of some of the Members of the Court, that an action would lie against the Judge of a Superior Court for his refusal to sign and seal a bill of exceptions; and it was argued that an action would *a fortiori* lie against an Inferior Judge for the refusing to take an appeal. It appears to me that this argument is not entitled to the weight ascribed to it. In the first place, I doubt the truth of the proposition, that an action does lie against a Judge of a Superior Court for refusing a bill of exceptions. The proposition contended for rests its authority on the passage in *Buller's N. P.*, p. 316, and on a passage in 1 *Shower's P. C.*, p. 117. I have not been able to find any decided case supporting that proposition; and in *Lessee Lawlor v. Murray* (b), Lord Redesdale casts a doubt upon it, and states it to be rather the result of *Buller's* own inquiries than of any decision. It appears even in *Buller* that if a Judge refuses a bill of exceptions, the course is not to bring an action against him for such refusal, but to sue out a writ from Chancery, commanding him to sign and seal the bill; and Lord Redesdale, in the case I have mentioned, has distinctly decided that this writ is not a matter of right nor of course, but the result of the judicial discretion of the Chancellor. If the Chancellor think fit to issue the writ, the Judge is bound to make a return to it; and if he returns *non ita*, it was the opinion of *Buller* that an action of false return lay against him. It appears to me to

(a) 10 Q. B. 152.

(b) 1 Sc. & L. 78.

be plain that it was never considered that an action would lie against the Judge in the first instance, but only for a false return. Where a writ is directed to a Judge, it may be that his whole duty is merely ministerial, either to obey it, or return *non ita*; and there may be no distinction between a false return made by a Judge and any other person; but is there not a wide distinction between bringing an action in the first instance, and one for a false return? In the latter the inquiry is only into the truth or falsehood of the return; but in the former, if the action lies, the inquiry will be not only as to the facts omitted to be done, but the jury will also have to inquire into the nature and the motives by which the conduct of the Judge has been influenced, and the cause of his conduct. The case put is therefore not, in my opinion, analogous to the present case.

The next point I shall advert to is the nature of the acts set out in the pleading, whether they are judicial or ministerial. In order to ascertain their nature, it will be necessary to see what constitutes the appeal. The appeal consists in the doing of a certain number of acts, which, when done, and not before, the Assistant-Barrister is bound to take the appeal, and justified in stopping the proceedings. What are the acts to be done? First, the costs are to be paid, and then a recognizance to be entered into with sufficient sureties, and an affidavit to be made in the form prescribed by the Civil-bill Act. Here are three distinct matters necessary to entitle a party to an appeal, and the Assistant-Barrister is not warranted in stopping the decree until all these acts have been done to his satisfaction. As soon as the Assistant-Barrister has pronounced his decree he has adjudicated, and has given the plaintiff a right to ask for a document enabling him to enforce payment of his demand; and I think it is the bounden duty of the Assistant-Barrister not to intercept or delay the rights of the plaintiff until every one of the above acts has been done. Who is the person to decide whether those matters have been done or not? Clearly the Assistant-Barrister, and no one else. First, as to time within which the appeal is to be lodged:—the Act of Parliament is silent upon the subject. There must be some limit of time; very possibly the practice of the Court may be the mode of ascertaining it. Who is to judge

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whether the appeal was lodged in time or not? Is that a judicial act or not? Upon that we have the authority of Serjeant Warren in the case referred to by my Brother GREENE. Secondly, there is the payment of costs. The statute says they are to be paid in the first instance. The payment of these costs is a fact capable of being substantiated or disproved by evidence. Suppose one party alleged that he had paid them, and the other deny it, would it not be the duty of the Assistant-Barrister to decide that fact, and hear, if necessary, the evidence upon the subject? and yet it is contended that the result of the opinion to which he may arrive on this evidence is not a judicial act. Again, as to the recognizance. The statute requires it to be in a particular form. We all know that numerous appeals have been dismissed in consequence of the recognizance not being in the form prescribed by the statute. The Barrister ought not to take it unless in proper form; it is his duty to see that it is right; and is it not the exercise of his judicial mind to say whether it contains the prescribed requisites? Again, sureties are to be given. Is not their sufficiency to be determined by examination or evidence? and is not that a matter of judicial determination? Similar observations apply to the affidavit. It must be in the form prescribed, and made by the attorney who appeared for the party on the hearing. Who is to decide on this matter? In my opinion, no person but the Assistant-Barrister. I therefore am of opinion that all these acts are judicial acts. But supposing that some or one of them are ministerial, and one only judicial, still in my opinion the result would be the same; because the taking the appeal depends on all these several matters being done to the judicial satisfaction of the Barrister.

If then all or one of the acts necessary to constitute an appeal be judicial, then there arises the general and most important question, whether an action can be maintained against a Judge of a Court of Record for any thing done or omitted to be done by him in the discharge of his judicial duty, particularly where no malice is attributed to him in the pleading? This part of the case has been so fully gone into by my Brother GREENE, that I shall do nothing more than read the judgment of Lord Tenterden, in the case already referred to, of

Garnett v. Ferrand. His Lordship says (p. 625):—"It is a general
"rule, of very great antiquity, that no action will lie against a Judge
"of Record for any matter done by him in the exercise of his judi-
"cial functions. This freedom from action and question at the suit
"of an individual is given by the law to the Judges, not so much for
"their own sake as for the sake of the public, and for the advance-
"ment of justice, that being free from actions, they may be free in
"thought and independent in judgment, as all who are to administer
"justice ought to be. In the imperfections of human nature it is better
"even that an individual should occasionally suffer a wrong, than
"that the general course of justice should be impeded, and fettered
"by constant and perpetual restraints and apprehensions on the part
"of those who are to administer it. Corruption is quite another
"matter; so also are neglect of duty and misconduct in it. For
"these I trust there is, and always will be, some due course of
"punishment by public prosecution." To every part of this clear
and able judgment I fully subscribe; and in my opinion, a contrary
doctrine would be most dangerous to the due administration of the
law. There was a time when Judges holding their offices at the
pleasure of the Crown were subject to its influences; and history
tells us of numerous instances in which Judges were induced by
that influence to swerve from what was right, and do what was
wrong. That influence has been long since removed; but if we
hold that their judicial conduct may be submitted to the deter-
mination of a jury, we will, I think, create another influence,
as arbitrary and more capricious than that of the Crown, and
more dangerous, because it would be in constant operation. There
were comparatively few cases in which the Crown could have an
interest to exert its influence; but the other influence I have
adverted to would be operative in every case, and the Judge would
feel in every decision he made that he was at the mercy of a discon-
tented suitor, or a dissatisfied attorney, to harrass him by bringing
his conduct before a jury for their determination. I cannot con-
ceive any thing more injurious than this to the due administration
of justice.

I think the judgment of the Court of Queen's Bench ought to be
affirmed.

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I have the misfortune to differ from my learned and able Brethren who have preceded me, as to the judgment which we are called upon to pronounce in this case; but I would not be understood as expressing my dissent from the law as propounded by them upon the principal question which has been discussed before us. This is undoubtedly a case of vast importance to the administration of justice. As presented to us in argument by the Counsel at both sides, it raised questions which I think we are not called upon to determine in the abstract, and upon which I much doubt that it would be proper for us to pronounce any decision with reference to the facts of this particular case as they now appear on this record; for, in my opinion, the case has not received a satisfactory trial. It appears manifestly upon the record, that the facts of the case were not brought fully before the Court and jury. The defendant's Counsel—relying strongly upon the principle that a Judge of a Court of Record (which an Assistant-Barrister undoubtedly is) cannot be held answerable in an action for any thing done by him as such—declined to offer any evidence, or go into any case on behalf of his client, but called for a nonsuit, or a direction to the jury to find a verdict for the defendant.

No doubt the learned Counsel was sustained, not only by the concurrence of the Judge who presided at the trial, but by a strong current of authority, commencing from the early records of our law, and coming down to our own times, in contending that Judges cannot be sued for matters done by them in their judicial capacity. It is essential to the firm and impartial administration of justice that Judges should be free from the influence of hope or fear in the exercise of their judicial functions. This exemption from liability to action is not conceded to them for the personal benefit of the individual, but for the advantage of the whole community: without it (considering the infirmity of human nature), the pure, calm and independent administration of justice could not be secured. It is quite as necessary for the preservation of the rights and liberties of the subject, that the Judges should be free from popular influences, as that they should be independent of the

Crown. And it is a remarkable fact that their independence, as regards their fellow-subjects, was established at a very early period, indeed, of the history of our Common Law, and has been as it were interwoven in the very frame-work of our constitution—whereas their independence in reference to the Crown has been the result of comparatively recent legislation. But whilst I fully admit this salutary principle of our law, I think it equally well established that there are certain limits to its application. It cannot, I apprehend, be doubted, that if those who are clothed with judicial authority, and consequent judicial privilege, act only *ministerially*, or act *extra-judicially*, they are not in such cases entitled to protection. But, as I have already stated, that in my judgment this case has not been fully and satisfactorily tried; and as I apprehend it must receive another trial before another jury, I abstain from pronouncing any opinion at present as to whether the refusal of the Assistant-Barrister to receive the appeal in this case is, or is not, within the limits of judicial protection.

It does appear to me that one of the plaintiff's exceptions is well founded, and that the learned Judge ought to have left the consideration of the case to the jury upon the evidence, with suitable observations and instructions thereon; for it by no means follows that because a Judge is clothed with a judicial character, and exercises judicial functions, that therefore, in every instance, whatever is done or omitted to be done by him must necessarily be deemed to have been done or omitted judicially, even though it may have some reference to, or connection with, a cause which has been pending before him. The case of *Floyd v. Barker*, which extends the principle of protection to Justices of the Peace, takes this distinction, and shows that there may be acts or conduct of a Judge, having reference to a cause, which may be regarded and dealt with as extra-judicial, and not as judicial acts; and the same distinction will also be found in more modern cases. It seems to me therefore that it must depend upon the facts and circumstances of the case appearing in evidence, and the fair inferences arising from them, whether the Assistant-Barrister should be deemed entitled to the benefit of the principle we have been discussing; and I

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am therefore of opinion that this exception should be ruled with the plaintiff, and consequently that a *venire de novo* should be awarded: for I cannot concur with my Brother GREENE, that there is but one ground of exception on this record. It appears to me that the plaintiff insisted on three distinct matters—first, that the refusal to receive the appeal was not a judicial act; secondly, he required the learned Judge to leave the consideration of the case upon the evidence to the jury; and thirdly, he called upon the Judge to direct the jury, if they believed the evidence for the plaintiff, to find a verdict for him: and this appears to me to be the fair construction of the bill of exceptions, the words, “and also,” being interposed between the first and second clauses, and the word “and” between the second and third clauses: and observe what immediately follows:—“But the learned Judge refused so to direct the jury, or “to leave the consideration of the evidence to the jury, but directed “a verdict for the defendant, expressing his opinion to be, that the “defendant, acting as a Judge of a Court of Record, was not liable “in the present action for the breach of duty in the plaintiff’s declaration alleged; to which *opinion and direction* Counsel for the “plaintiff objected, and did then and there except.”

I think it for the advantage of both the parties that a new trial should be had. It is plainly so for the plaintiff; and I consider it not less so for the defendant, because there is on this record a grievous charge of misconduct assumed against him by the course which has been taken at the late trial; which charge might have been repelled by a verdict for him, had the case been submitted to the jury, with proper instructions in point of law. Had the learned Judge so ruled, it is probable the defendant might have given evidence which would have materially altered the complexion of the case; but if the defendant did not go into evidence, still it would have been for the jury to consider the credit due to the witnesses examined for the plaintiff—the inferences which might be drawn from their testimony favourable to the defendant, and also the fair presumption, arising from the judicial position and character of the highly respectable defendant, and the solemn obligation of the oath under which he discharges his duty as Assistant-Barrister.

It has been said the case ought not to have been left to the jury, because the declaration does not contain any sufficient cause of action. I would ask, is it so perfectly clear that the declaration would be held bad on general demurrer? But suppose it to be so, the defendant has not demurred, but has pleaded "not guilty," and at the trial the plaintiff has given evidence in support of the several averments in his declaration—the defendant offering no evidence on his part—is it the proper course in such a case not to try the issue joined upon the record, but to direct a verdict for the defendant? Or would it not be the better course to take the verdict of the jury upon the merits, and to leave the defendant (if necessary) to move in arrest of judgment, or to bring his writ of error? Let me put another case:—A defendant, instead of demurring to a bad declaration, pleads only a special plea in bar of the action (suppose accord and satisfaction), issue is joined thereon, and upon the trial the defendant offers no evidence in support of his plea—is the Judge, notwithstanding, to direct a verdict for the defendant? Or ought he not rather to let the jury find upon the issue joined for the plaintiff, and leave the defendant to move in arrest of judgment, or for judgment *non obstante veredicto*? Be this however as it may, in my opinion this case has not been satisfactorily tried. I think that the plaintiff's exception to the ruling of the learned Judge was well founded, and ought to have been allowed, and consequently that the judgment should be reversed, and a *venire de novo* should be awarded.

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BALL, J.

In this very important case, my judgment is rested upon the rule of law laid down by Bayley, B., in delivering the judgment of the Court of Exchequer in the case of *Lumby v. Allday*. The rule is there stated to be (p. 303):—"That if the facts alleged in the declaration be proved, it is the duty of the jury to find for the plaintiff; and if those facts do not disclose a sufficient cause of action, the defendant must move in arrest of judgment. Where a defendant is satisfied that the allegations, if proved, do not establish a cause of action, he ought to demur. The Judge is not at liberty to nonsuit, on the

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“ground that the facts alleged in the declaration do not amount to a
 “cause of action.” Again it is said (p. 306) :—“ When the general
 “issue is pleaded to a count, it puts in issue, to be tried by the jury,
 “the question, whether the facts stated in that count exist? The legal
 “effect of those facts, whether they constitute a cause of action or
 “not, is not properly in question. The proper mode to bring that
 “legal effect into consideration is, before trial, to demur; after trial,
 “to move in arrest of judgment. The duty of the Judge, under
 “whose direction the jury try questions of facts, is not to consider
 “whether the facts charged give a ground of action, but to assist
 “the jury in matters of law, which may arise upon the trial of those
 “facts.” The authority for such being the rule of law, to which the
 Judges are bound to conform on the trial of issues of fact, is not
 confined to the foregoing judgment of the Court of Exchequer; I
 find the same principle announced by the Judges in the case of
Bridgeman v. Holt (a), in their answer to a petition in the House
 of Lords; and furthermore, I find the same principle adopted in
Keenan v. Phillips (b).

Taking this to be the law, I apprehend its application to the present case is beyond question. The plaintiff's exception was in the alternative, that the Judge should either have directed the jury, if they believed the evidence, to find a verdict for the plaintiff, or else he should have left the consideration of the case upon the evidence to the jury. The learned Judge refused to direct the jury as required by the plaintiff; and he also declined to leave the case to the jury upon the evidence, assigning as his reason, that he considered the action unsustainable in point of law; and he directed the jury to find a verdict for the defendant accordingly. The course thus taken by the learned Judge appears to have been a departure from the law laid down in the above recited judgment of the Court of Exchequer, namely, that it is the duty of the Judge on the trial not to consider whether the matters alleged in the declaration afford, in point of law, a ground of action or not, but to leave the consideration of them to the jury.

Upon this simple ground, I am of opinion, that the plaintiff's

(a) 1 Show. P. C. 115.

(b) 5 Ir. Law Rep. 441.

exception to the the direction of the learned Judge should have been allowed by the Court of Queen's Bench ; it was the act of the defendant himself to have put his case upon an issue of fact, instead of raising the question of his liability in point of law, by demurring to the declaration : and the effect of the direction which he succeeded in prevailing on the learned Judge to give to the jury, was to rule in favour of the defendant a demurrer taken by him in terms at the trial, instead of being filed to the declaration, and thereby to deprive the plaintiff of his legal right to have the facts tried, and to the verdict of the jury in his favour, if the facts stated in the declaration were proved.

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In allowing the exception, the Court is bound, in my judgment, to award a *venire de novo*, instead of proceeding to decide the question as to the legal liability of the defendant in the action ; for as the effect of the allowance of the exception must be to set aside the verdict, no judgment can be had until the issue in fact, which has been joined on the record, shall be disposed of on a further trial. If, instead of allowing the exception, the Court were to overrule it, the verdict would stand, and the Court should proceed to give judgment on the whole record ; and the important question in the case, as to whether the refusal of the defendant to receive the appeal was a judicial or only a ministerial act, must have been thus decided : but I feel it a satisfaction that the allowance of the exception, on the ground which I have suggested, dispenses with the necessity of our deciding that question in the present stage ; as I think it probable, from what transpired in the course of the argument at the Bar, that the evidence may be given on a future trial (there having been no witness examined for the defendant, on the former occasion), which may disclose more of the true character of the transaction in question than has hitherto appeared, and may enable the Court to dispose of the point of law more satisfactorily, when the facts shall be better understood.

The judgment of Chief Justice Tindal, in *Trimleston v. Kemmis*, affords an authority as to the effect of the allowance of the exception being what I have above mentioned.

I therefore am of opinion that the judgment should be reversed.

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PEBBIN, J.

As my present opinion differs from the opinion I concurred in, in the Court below, I think it necessary to state my reasons at some length.—[His Lordship, having stated the pleadings and facts, proceeded to say]:—The learned Judge at Nisi Prius by his decision ruled a demurrer to the declaration, and a demurrer to the evidence, neither appearing on the record. He appears to have been misled by the case of *Dicas v. Lord Brougham* (a), where Lord Lyndhurst laid down the same law; but the pleadings there were different, and the facts did not disclose a cause of action. I should not, however, follow that example in a like case.

The exception, in my mind, necessarily involves the consideration of the action and declaration, and of the provisions of the Civil-bill Act (especially in this Court of Error). I shall therefore give my judgment, upon the entire of the direction of the Judge, to find a verdict for the plaintiff, in the manner he has done, because I should feel a difficulty in confining my opinion to the second ground of exception; for if the Court is not satisfied that the declaration is good in point of law, and contains a ground of action, why send it down on a *venire de novo*? We are a Court of Error, and it is our duty not only to consider the exceptions, but also the grounds of error; and though we should be of opinion that the exceptions ought to be overruled, yet we ought not to send down the parties upon a vain trial, which never could be made effectual.

This is a question of considerable importance to the administration of justice, and deserving of the fullest consideration. The matter charged in the declaration to have been committed, if true, is a grievance to the plaintiff, and a great breach of duty by the defendant—a Judge, who had determined a cause against the party, where that party had a right of appeal from that decision to a higher Court, on the performance of certain preliminaries provided for the security of the other party, and discouragement of unnecessary and dilatory litigation. If a party *refuse* to *permit* the performance of those preliminaries, and to *receive* them, and so prevent the appeal—thereby preventing inquiry into the justice of his own decree, contrary

(a) 6 C. & P. 249.

to his duty—to the express enactment of the statute—to the grievance and oppression of the suitor—it cannot be denied to be a great misdemeanor, as well as injury to the plaintiff. It is properly called by the learned Judge, the “breach of duty alleged in the declaration,” although his opinion was, an Assistant-Barrister, being a Judge of a Court of Record, upon grounds of public policy, and in order to secure the dispassionate and upright administration of justice, is not liable in an action, or responsible to any private or individual suitor, plaintiff or defendant, for his conduct as a Judge, nor to be called on to answer as a defendant to any proceeding of this description at the suit of every disappointed or angry suitor who considers the award against him unjust.

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It is necessary that I should refer to the provisions of the statute giving the party the right to appeal. The 29th section of 36 G. 3, c. 25, provides, that if any person shall think himself aggrieved by any decree of any Assistant-Barrister, he may appeal therefrom to the Judge of Assize, and the Judge is required to hear said cause—*which appeal* the Assistant-Barrister is thereby required to receive, and *stop all proceedings* on the decree; the party appealing first paying the plaintiff the costs, and entering before the Assistant-Barrister into recognizance in double the sum, with sufficient bail. And the 31st section provides, that no Assistant-Barrister shall receive any appeal unless the attorney of the party desiring to appeal shall first make an affidavit in writing that such appeal is not made for the purpose of delay. The making of that affidavit is the first step to be taken to enable a party to appeal; and the Assistant-Barrister, having notice of the intention of the party to appeal, and the party appealing having paid the costs to the opposite party preliminary to such appeal, the Assistant-Barrister is called on to administer the oath as the first step in the process, and it was his bounden duty to administer the oath to the attorney, and take his affidavit; and it was next his duty to inquire into the sufficiency of the bail and to take the recognizance, on which he is not merely to judge whether the terms of it are sufficient, but in which he is an actor himself; for he is not merely to sign his name to it, that it should remain as a record, but he is to ask the party whether he

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considers himself indebted in a certain sum on certain conditions? And he is previously to inquire into the sufficiency of that bail, and to satisfy himself upon it; and then he is to receive the appeal, and stop proceedings, and withhold the decree. No excuse is suggested for this refusal. The defendant was in Court, and it appears upon the evidence that he was at leisure to receive these preliminary matters, and make the necessary examination. The charge therefore is of neglect of duty in these several respects, namely, the taking the affidavit and recognizance, and the stopping the proceedings. There is therefore a distinct breach of duty in the refusal to obey the express enactment of the statute, and to perform the acts prescribed ancillary to the appeal; so that he is charged with frustrating a beneficial law made for the advancement of justice, and with violating his duty in not performing acts in respect of which he could exercise no discretion. He could not legally refuse to administer the oath; he could not refuse to examine the bail; he had no discretion to say he would not receive the appeal. The civil-bill was at an end after he had pronounced his decree, and every other duty he had to do was strictly prescribed, and he had no discretion to refuse to do it. He declined to do what was necessary to entitle the party to appeal; by his refusal to receive the oath, he thereby debarred the party of his right to appeal.

It is said however, notwithstanding this, that by the rules of law, no action will lie against a Judge of a Court of Record for any matter done by him in the exercise of his judicial functions: and *Garnett v. Ferrand* (a) is relied on as establishing that rule. I adopt the rule so laid down, though I would be far from grounding my opinion on *Hammond v. Howell*, and *Floyd v. Barker*. The rule is laid down by Lord Tenterden thus:—"No action
 "will lie against a Judge of a Court of Record for any thing
 "done by him in the exercise of his judicial functions. This freedom from action and questions at the suit of an individual is
 "given by the law to the Judges, not so much for their own sake
 "as for the sake of the public, and for the advancement of justice,
 "that, being free from actions, they may be free in thought and

(a) 6 B. & C. 625.

“independent in judgment, as all who are to administer justice
 “ought to be.” And he adds:—“Even inferior Justices, and those
 “not of Record, cannot be called in question for an error in judg-
 “ment, so long as they act within the bounds of their jurisdiction.
 “Corruption is quite another matter, so also are neglect of duty
 “and misconduct in it.” And in *Taaffe v. Lord Downes*, Judge
 Fletcher (p. 165) says:—“It is of the utmost consequence, that
 “Judges, in the exercise of their important functions, dispensing
 “justice from the Bench to their fellow subjects, should feel in
 “every respect independent, and have their minds undisturbed by
 “any anxiety, but that which must attend every good and honest
 “mind so employed, anxiety to administer justice uprightly and
 “impartially under the law. They should not be distracted by
 “apprehension of, or teased by, actions prompted by the caprice
 “or ill-temper of perverse or litigant suitors; their judgments are
 “not to be submitted to reconsideration or revision, but in the Court
 “of Appeal, which the Constitution has created and appointed for that
 “purpose. It would be absurd—it would be preposterous, as well as
 “unjust in the extreme, to subject men to actions for the errors of
 “their judgments, to bring, not the doctrines they promulgate, or
 “their adjudications, before a Superior Court of Appeal for recon-
 “sideration and examination, but the Judges themselves before
 “co-ordinate tribunals to answer in damages for such decisions as
 “equally fallible individuals may pronounce erroneous, or rather
 “for such decisions as they may not assent to, or see the value and
 “propriety of, themselves being equally liable to misconceive the
 “law. It would besides be infinite.” The law in fact is quite
 settled, and it is quite unnecessary to refer to the numerous autho-
 rities on the subject.

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The inquiry therefore is not as to what the law is, but what is the matter disclosed on this record, and complained of by the plaintiff. Is it examinable in an action? in other words, are the acts charged judicial or ministerial? are the acts done in the exercise of his judicial functions? or are they to be considered ministerial and imperative, which the Assistant-Barrister was bound to perform, having no discretion left to him on the subject? Even if the matter

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be not an exercise of judgment, and in that sense judicial, is it within the range of judicial proceedings, not inquirable from respect of the character of the person, though not from that of the act or non-act?

In the Court below we erred—first, in throwing aside the consideration of the imperative words of the statute, and assuming truly that the nature of the duty to be executed by the Assistant-Barrister in receiving the appeal did not preclude inquiry and exercise of judgment in its execution; and conceding that the right of appeal was not absolute, but given upon certain terms and conditions, to be complied with or performed before it can be received, for the benefit and protection of the other party, each of them demanding the decision of the Judge that it has been performed, and each of which the Assistant-Barrister is bound to see performed or complied with. He is to see that the affidavit has been made by the attorney—that it is conformable to the statute, and in proper form—that the bail are sufficient—that the recognizance and the condition what the law requires; as Assistant-Barrister, and in that capacity, he is to see, attend to, and do these matters; and as the result, to decide whether they have been done, or, as we put it, *ore rotundo*, whether the party has established his right to have his appeal received, and to have the execution of the decree—the right of the other party—suspended. We lay it down that the allowance of an appeal is a decision between the parties in the former cause, giving a right to one, and divesting the right of the other; that whether the proceeding is *ex parte* or not, when he allows the appeal he adjudicates on a right, and it is impossible to regard it otherwise than judicial; that if he errs in his opinion on any of the subjects committed to his decision, he is not liable to an action, nor subject in one to justify his act: and therefore we held that the Judge at Nisi Prius was right, and the exception should be overruled. I think we overlooked the real nature of the case and ground of complaint, which is not that he erred in opinion or judgment on any of the subjects committed to his decision, or rather to his care, but that he refused to enter on his duty, to put himself in a capacity to form an opinion on any of those subjects, which there can be no doubt would have been correct, and for which opinion, though erroneous (on the only matter for the real exercise

of judgment, the sufficiency of the bail), he would not be liable in an action. It is analogous to an appeal lodged with the Sheriff. By the statute the Sheriff is authorised to take an appeal where the party does not appear in the Court below ; and to entitle the party to do so, he must deposit the amount of the decree with the Sheriff, and enter into a bond, with condition to perform and abide the decree of the Judge, and thereupon the Sheriff *shall stop* proceedings on the decree, and give the party a certificate that he has appealed. If a party so circumstanced went before a Justice of the Peace, and asked him to receive the appeal, and the Justice refused, could it be said he was exercising a judicial function ? If the Sheriff refuse to take the bond with a proper condition, could it be said he was exercising a judicial function ? In *Taaffe v. Lord Downes*, it was held that the Chief Justice was exercising a judicial function ; and Judge Fox draws the distinction between the act of a Judge and an ordinary Justice of the Peace. Here the Assistant-Barrister was exercising powers, not for the purpose of forming his own judgment ; he was in the same position as the Sheriff. In both cases the civil-bill cause had closed ; there was no *lis pendens*. It is enough to rule the question, to say the functions of the Judge closed with the decree ; the subsequent duty was ministerial, and merely ancillary to the appeal or re-hearing before the Judge of Assize, on whom jurisdiction is conferred : it therefore appears to me that these were ministerial, and merely ministerial, acts ; though there was an exercise of the mind in taking the affidavit and deciding the sufficiency of the bail, just as in the case of an appeal lodged with the Sheriff ; but that mere exercise of judgment will not make the act judicial. In *Midhurst v. Waite (a)*, Lord Mansfield says :—"It is "taking the definition too large to say that every act, where the "judgment is at all exercised, is a judicial act ; a judicial act is "supposed to be done *pendente lite* (of some sort or other)."

There can be no doubt that an Assistant-Barrister is a Judge of Record, and where he is acting judicially, or has a discretion to exercise, no action can be maintained against him, at least without

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(a) 3 Burr. 1263.

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malice expressly charged and distinctly proved. If he had received the affidavit, examined the bail, and adjudged them not qualified, or rejected the affidavit or recognizance as defective in form, no action would have lain against him on the allegation that the bail was well qualified, or that the affidavit and recognizance were perfect in form and free from objection. Acting within his jurisdiction, the Assistant-Barrister must be respected and upheld; but when he was required to receive the appeal, and examine the bail and take the affidavit and recognizance, he was required to do a merely ministerial act—touching it he had no discretion, no judgment to exercise, although requiring some exercise of mind. As to the taking the bail, or its sufficiency, there may be some discretion to exercise, but none as to the taking the affidavit. How could it be judicial? There is no difficulty in separating the act of taking the affidavit of the attorney and the act of allowing the bail to be examined as to their sufficiency, and the act of forming a judgment upon their sufficiency or qualification when examined. It is for the refusal to do the prior act that this action is brought, and which first act is merely ministerial. Where there is a ministerial act to be done by one who on other occasions acts judicially, the refusal to do the ministerial act is equally objectionable as if no judicial functions were on any occasion intrusted to him. There seems no reason why the refusal to do a ministerial act, by a person who has certain judicial functions, should not subject him to an action in the same manner as he is liable to an action for an act beyond his jurisdiction. The refusal to do the ministerial act is as little within the scope of his functions as a Judge, as the act when his jurisdiction is exceeded. In the act beyond his jurisdiction he has ceased to be a Judge. As to the ministerial act, which may be initiatory to a judicial proceeding, he is not yet clothed with the judicial character. All proper respect is to be shown to judicial authority; but authority must be defined, or arbitrary discretion and despotism will be established, and real justice sacrificed to the temper of those who delude themselves into a belief that they are consulting its interests. If then the act was not within the protection of the judicial privilege, it was plainly an unlawful and deliberate refusal to do his duty, and a neglecting of that duty to the prejudice and injury of the party complaining.

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The authorities show that a person for whose benefit a statute requires an act to be done or forborne, though no action be given in terms by the statute, shall, for omission or commission to his injury, have an action by the Common Law : *Com. Dig., Action on Stat., 2 Inst. 55, 118; Ferguson v. Kinnoul (a)*. I do not cite this case as governing or bearing directly on the present, but for the *dicta* of some most able, learned and exact minded Judges, which appear to me weighty authorities, and to bear on this question. In that case the defendant had a mixed duty to perform, to examine the candidate for the office, and if fit receive him; the first was ministerial, the second judicial. Lord Campbell there says (p. 310):—
 “By the law of England, when damage is sustained by one man
 “from the wrong of another, an action for compensation is given to
 “the injured party against the wrong-doer.” And in p. 263, The Lord Chancellor says:—“When the law says that persons are
 “bound to do a certain thing, they are not entitled to avoid doing
 “it, by referring the party who requires the performance of the act
 “to another body. If they refuse to do it, they subject themselves
 “to an action. Every refusal or neglect of what a party is bound
 “by the law to perform, if it works a wrong to another, is the
 “subject of an action.” And Lord Cottenham adds:—“To enter
 “on his trial is a ministerial act; the Presbytery afterwards ex-
 “ercises a judicial power in determining whether upon his trial he
 “has proved himself fit for the ministry.” And Lord Campbell says (p. 311):—“There can be no doubt that for many purposes
 “the Presbytery is a Court, and that it has not only Ecclesiastical
 “functions, but jurisdiction in certain civil matters. When the
 “Presbytery is acting judicially, or in any matter where its mem-
 “bers have a discretion to exercise, no action could be maintained
 “against them, at least without malice expressly charged and
 “clearly proved. If they had taken Mr. Young on trial, and
 “adjudged that he was not qualified, for being *minus sufficiens in*
 “*literaturâ*, or from any objection to his orthodoxy or his morals,
 “or that from some personal defect he was incapable of satisfac-
 “torily serving, there their judgment could not have been reviewed

(a) 9 Cl. & Fin. 251.

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“by any Civil Court; and certainly no action would have lain
“against them on the allegation that in truth he was well qual-
“fied and free from all objection. The Church judicatories,
“acting within their jurisdiction, must ever be respected and up-
“held. But when the members of the Presbytery were required
“to take Mr. Young on trial, in my opinion they were required to
“do a mere ministerial act. Touching that act, they had no dis-
“cretion; they had no judgment to exercise. How then could it
“be judicial? There is no difficulty whatsoever in separating the
“act of appointing him to appear before them to be examined,
“and the act of forming a judgment upon his qualifications when
“he has appeared before them and been examined. It is for a
“refusal to do the first act that this action is brought, and the
“first act is purely ministerial.”

It does now seem to me, and upon long and full examination, deliberation and consideration of the case, and the many authorities that have been referred to at the Bar, and by some of the Bench, that we were in error, palpable error. That because the Assistant-Barrister who does his duty, who takes the affidavit, who examines the sufficiency of the bail, takes or refuses thereon the recognizance in the words prescribed, and receives or refuses the appeal, exercises an act of judgment, judicial though erroneous, that therefore the Assistant-Barrister who neglects, and disregarding his duty and the statute, refuses to take the affidavit, to administer the oath, to take the recognizance, or to inquire into the sufficiency of the bail, without assigning any reason, refuses the appellant and his appeal, adjudicates or exercises a judicial act.

It has been argued however, that where there is a mixture of judicial and ministerial acts no action will lie; and *Linford v. Fitzroy* (a), and the words of Lord Denman are relied on; he says:—
“But upon the fullest consideration, we are of opinion that the duty
“of the Magistrate in respect to admitting to bail cannot be thus
“split and divided; that it is essentially a judicial duty, involving
“inquiries, on which discretion must be exercised; and in some
“cases of misdemeanour, discretion under circumstances of much

(a) 13 Q. B. 240.

“ nicety; and that we cannot lay down a rule which is to depend upon
 “ the peculiar facts in each case. The broad line of distinction is
 “ this—that unless the duty of the Magistrate is simply and purely
 “ ministerial, he cannot be made liable to an action for a mistake in
 “ doing or omitting to do any thing in the execution of that duty.”
 I do not quarrel with that, but here the duty was purely ministerial.
 It therefore appears to me that this authority does not impugn the
 doctrine laid down by the Judges in the House of Lords (in p. 306),
 where Lord Cottenham says:—“ The principal ground of defence on
 “ which the appellants relied was, that they were exercising certain
 “ judicial functions, which as a Court they were competent to exer-
 “ cise; and that they were not liable, if they had fallen into error in
 “ the exercise of those judicial functions. The interlocutor in the
 “ *Auchterarder* case, affirmed in this House, entirely excludes any
 “ such ground of argument. They indeed assumed in that case, as
 “ they have in this, that the law had reposed in them some discretion
 “ as to whether they should or should not take the party duly pre-
 “ sented on his trial. The interlocutor of the Court of Session decided
 “ that they had no such discretion, but that it was their bounden
 “ duty to do so; that they had no option; that it was a right which
 “ the party presenting was entitled to claim as against them—a
 “ public duty which they were bound to perform.” It appears to
 me that these judgments are very strong, and bear directly upon this
 case.

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But since the matter was argued, our attention has been called to
 the practice on bills of exceptions, and the rules in such cases appear
 to me to bear forcibly here. By the Statute of Westminster, the
 Judge is required to sign a bill of exceptions. That statute was
 passed to remove the difficulty a party had in entering his bill of
 exceptions. It is in the nature of an appeal. The Judge is required
 to sign the bill of exceptions on a statement of matter upon which
 he has made his rule, on which he has decided, and is *functus*
officio. The bill of exceptions is merely ancillary to an appeal
 and re-hearing thereon, in which he is merely ministerial, authenti-
 cating matter for a Superior Court to examine. If he refuse to do
 so, or if he untruly returns *non ita*, he is liable to an action at

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Common Law. The statute gives no action, but it has been decided that an action lies at Common Law: 2 *Inst.*, p. 486, where it is laid down:—“*Super vero statutis in defectum legis, et ad remedia editis, ne diutius querentes, cum ad Curiam regis venerint recedant de remedio desperati, habeant brevia sua in suo casu provisum. Ad remedio:*” that is, when any statutes made at this Parliament provide remedy for the party aggrieved, he shall have an action grounded upon this Act for his relief therein. And in same book, p. 427:—“*Justiciarii apponant segilla sua.*” And Lord Coke, in his *Commentary*, adds:—“Here is an express commandment given to the Justices; and yet if one refuse, and any of the other insert the bill, it sufficeth; but if they all refuse, it is a contempt in them all; for it lyeth not in the power of the Justices that denyed to perform the purview of this Act, to take advantage of their own wrong, and the party grieved may have a writ grounded upon this statute to the Justices.” *Reg. Brev.*, p. 182. *Rastal's Entries*, p. 293. The same law is laid down in 1 *Bac. Abr.*, p. 780:—“If one of the Justices sets his seal to the bill it is sufficient; but if they all refuse, it is a contempt in them all, for which the party grieved may have a writ, grounded upon the statute, commanding them to put their seals.” So if an Assistant-Barrister refuse to receive an appeal, and to proceed to take and examine the preliminaries—is it not a contempt? The same law is laid down, 2 *Tidd Prac.*, p. 867, and in *Bul. N. P.*, p. 316. Mr. Tidd was a very well informed and correct compiler, and Judge Buller a Judge of learning and reputation, and the authority of these passages was never drawn in question. But a question has been raised as to its being a writ of right, in *Lawlor v. Murray* (a), where the Lord Chancellor says he could find no trace of any such writ as this having been issued on any occasion like the present; but there the action was not for a refusal to sign the bill of exceptions, but for a false return. But in *Bridgeman v. Holt* (b), in the answer of the Judges they say, that if the pretended bill was duly tendered to those respondents, and was such as they were bound to seal, those respondents are answerable only for it by the course of the Common Law, in an

(a) 1 Sch. & Lef. 76.

(b) 1 Show. P. C. 117.

action to be brought on that statute. That law is not denied by the Counsel on the other side in that case. There is no assertion that no action would lie against the Judges—none that the remedy was in Parliament, and Parliament only, but that damages would give no reparation. It therefore seems to me that this is an authority of much weight upon the very point. So in *Wright v. Sharp* (a), where it was held that a bill of exceptions must be tendered at the trial, Holt, C. J., says:—"If this practice should prevail"—(that is of not tendering at the trial)—"the Judge would be in a strange condition. He forgot the exception, and refuses to sign the bill, so an action must be brought. You should have insisted on the exception at the trial."

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It appears to me that these authorities amply sustain the position of the text-writers Buller and Tidd, and that all are conformable to, and warranted by, the statute, and that they are not impugned or shaken by Lord Redesdale's observations in *Lawlor v. Murray*: on the contrary, he, who knew Buller and his character, appears to acquiesce in the position which he supposes to be the result of his investigation, and respect for which requires circumspection before subjecting Judges to its peril. He too accounts for the paucity of authorities consistently with that view of the law, rendering it unlikely that the Judges would resist.

It appears to me that the analogy is very strict between the duty of an Assistant-Barrister receiving an appeal and that of a Judge signing a bill of exceptions, both being ancillary to the further examination of the case; and it being established that an action will lie for refusing to sign the exceptions, or for a false return of *non ita* against a Judge of the Superior Courts, it follows *a multo fortiori* that an action must lie against an Assistant-Barrister for refusing to swear the attorney to the affidavit to take the recognizance of the party and of the bail, and to receive his appeal.

There is some difficulty thrown in the way of the form of action which might be brought against a Judge. It is said it should be an action on a false return of *non ita*. If that objection were well founded, I would not say it was a sufficient answer to the argument;

(a) 1 Salk. 288.

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for although the remedy may be circuitous, it is a substantial action against him for not doing his duty, for not enabling the party to have his exceptions received on a writ of error. But I should consider the proper course of proceeding against a Judge for refusing to sign a bill of exceptions would be an action on the case, and that the party would have a right to that action without going through the form of having a writ. It was thrown out by the *Attorney-General* in the course of the argument, and in reply to this analogy, that the action was given by the Statute of Westminster in terms against the Judge; this is a mistake. The statute provides the bill of exceptions for remedy of the party aggrieved by the Judge's error, in order to the correction of that error, by putting the matter on record for renewal and re-hearing by the Superior Court; and if the Judge, frustrating that remedy, denies the bill of exceptions, the party grieved by that denial shall have an action grounded on the duty imposed by the statute for his relief or redress. It would seem that then the party might not only have damages, but establish the fact of his exception; and so the action is grounded on the statute, but not given by the statute, but by the Common Law.

Upon these grounds, that this was a matter not falling within the description of an act done by a Judge in the exercise of his judicial functions, but rather that it was neglect and omission to do a duty in a matter which was not a matter in the exercise of judicial functions, or within range of the protection afforded, if done in the exercise of those functions, I therefore am of opinion that the judgment of the Court of Queen's Bench should be reversed.

CRAMPTON, J.

The exceptions taken in this case were overruled in the Court below, and judgment *there* given for the defendant. In that judgment I concurred; and on *the points discussed and decided* in the Queen's Bench, I am prepared to abide by that judgment still. I think that a Judge, whether of a Court of Record or not of Record, is not liable to an action for any act done by him *quâ* Judge within the scope of his jurisdiction. I also think that the receiving of an appeal is an act of judicial discretion, and that an Assistant-Barrister,

refusing to receive an appeal, is not, *merely for such refusal*, liable to an action. T. T. 1852.
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The act complained of in the declaration in this case is not alleged to have been done maliciously; indeed at the Bar, and during the argument, such an imputation upon a man of known integrity and honour was utterly repudiated. There was nothing to go to the jury upon the subject of malice; it is therefore quite unnecessary for me to discuss what the legal effect might have been, had the declaration in this case, like that in *Linford v. Fitzroy*, contained an allegation that the defendant acted maliciously. I do not therefore quarrel with the legal doctrine laid down at the trial; my difficulty is as to the peculiar duty of the Judge and jury at *Nisi Prius*: neither do I enter into the sufficiency of the declaration; it is quite unnecessary for my view of the case that I should do so.

If the declaration does disclose a ground of action, the direction of the Judge is clearly wrong; there was evidence to support the declaration, and the case should have gone to the jury. If the declaration be bad, still the case should have gone to the jury, on the principle that a demurrer to the declaration, or a motion in arrest of judgment, cannot be discussed or decided at *Nisi Prius*. The ground upon which my opinion is formed is quite remote from the merits of the case; it was not relied upon at the Bar, either here or in the Court below, nor was it noted in the Judges' books. But yet appearing as it does distinctly upon this record, I feel myself compelled, and I will add, most reluctantly compelled, to come to the conclusion that this case should undergo a new trial.

Were the matter to which I refer a matter of discretion—were it a mere departure from technical forms—did it come before me upon a motion merely, I should lay no stress upon it; I should in that respect adopt the opinion of the Court of Exchequer in *Roach v. Johnston* (a), and consider that the party had waived his right to rely upon it: for my impression is that the case was withheld from the jury, not by the mistake of the learned Judge who tried the cause, but by the act and agreement of the parties, each insisting on his right to a direction on the legal grounds suggested in the

(a) Hay. & Jo. Rep. 249.

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record, viz., the defendant insisting that the act of refusing the appeal was a judicial act, and the plaintiff insisting that it was merely ministerial act. But the bill of exceptions, as I read it, will allow me to put that construction upon the proceeding; I must give my opinion on the record as it stands; and the record, to my understanding, plainly asserts that the learned Judge, though called on by the plaintiff to submit the case upon the evidence to the jury, refused to do so. To this subject I shall hereafter, however, address myself more in detail. Taking now such to have been the course followed by the learned Judge below, I think (with great deference to those from whom I differ) that this case has not been properly tried—that in effect it has not been tried at all.

The plaintiff's declaration charged the defendant with a wilful breach of his duty as Assistant-Barrister in refusing his appeal; the defendant did not demur to the declaration, but, pleading the general issue, denied the truth of the charge, and upon this issue so knit the parties came down to trial. The plaintiff gave evidence in support of his declaration; the defendant offered none, but called for a nonsuit or a direction, not on the ground that the proof varied from the statement, or that the declaration was not sustained in evidence, but on the ground that the plaintiff, supposing his declaration to be proved, had shown no cause of action against him. The plaintiff did not consent to be nonsuited; and the learned Judge, concurring in opinion with the defendant's Counsel, directed a verdict for the defendant, and to that direction the exceptions now before us were taken. This is the history of the case as appearing on the record; whether a true history, is another matter. The direction given by the learned Judge was given then not on the evidence—not on the ground that the evidence did not sustain the declaration—but distinctly and confessedly on the ground that the declaration, on the face of it, supported as it was by the evidence, did not disclose a legal ground of action against the defendant—that is, in other words, that the declaration was substantially bad, bad on general demurrer. Now, it appears to me that the Judge had no authority to take such a course. My Brother MOORE, in doing so, went beyond the province assigned by his commission to a Judge of Assize; it is, I

apprehend, *his* province to try (or rather to assist the jury to try) the questions of fact upon which the parties are at issue, and not to decide questions of law. There are (as we all know) two classes of issues which are or may be knit upon the record—issues in law and issues in fact; and these are very different in their character, and in their mode of trial also. An issue in law supposes the facts to be admitted, and is triable by the Court sitting in Banco. An issue in fact supposes, for the purposes of the trial, the law to be admitted, and is triable by a jury only, under the guidance of a Commissioner, who may or may not be a Judge. If the law and fact be mixed in the issue, that issue is also triable by a jury.

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When a declaration, such as that now before us, is filed against a defendant, he has an option—he has an election. Admitting the facts stated in the declaration to be true, he may demur—that is, he may refer to the Court to determine whether the declaration contains any legal charge against him, for which he is liable to the plaintiff in an action; the trial then between the parties is by the Court sitting in Banco. Or, admitting the plaintiff's legal title to redress, as appearing on his declaration, the defendant may deny the truth of its allegations, join issue upon the facts, and then the trial must be by a jury; and upon every issue so joined the jury must pronounce a verdict: and the rule of law is strict, that the Judge cannot of his own authority discharge the jury from finding upon each separate issue, unless there is one issue found by the jury which renders the other issues immaterial, as in the case of a plea to the whole declaration found for the defendant: *Edge v. Wandesford* (a). Now, in this case no issue in law was joined; the defendant traversed the whole declaration, putting in issue the truth of its statements, and yet upon that issue there was no finding in point of fact. The verdict of the jury was given as upon a point of law, affirming no matter of fact, but only affirming that the declaration, though proved, disclosed no cause of action against the defendant. Was not this, under the form of a trial at Nisi Prius, deciding a demurrer to the declaration? Was it not to transfer from the Court in Banco to a Judge and jury at Nisi Prius a legal question arising

(a) 9 Ir. Law Rep. 161.

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upon the record? Under such circumstances, that which was the only province of the Judge and jury, under the commission and writ of Nisi Prius, was left *undone*, and that which belonged entirely to another jurisdiction is that only which *was done*. The defendant may be entirely right in asserting that he is not liable to this action, and the Judge in affirming that legal proposition, but the trial at Nisi Prius is neither the time or the place for that assertion. The denial of the right of action can, before trial, be only by a demurrer to the declaration; after trial, it is open to the defendant to raise the same question by motion in arrest of judgment and by writ of error. In answer to the defendant's call for a nonsuit, or a direction on such a ground, the Judge's answer should be:—"You might have demurred, but by pleading not guilty you have admitted the sufficiency of the declaration, you have taken issue upon the truth of its allegations; you have put yourself upon the country, and the truth or falsehood of the charge in the declaration is that only which can be tried by the jury." Let me suppose that in this case the defendant had pleaded a special plea, for instance, that the appeal was not tendered in time, and had given no evidence in support of his plea, would the Judge be warranted in telling the jury to find for the defendant because the declaration was bad? If so, then even if there had been judgment by default, and an inquiry of damages, the Judge might give the same direction; I see (I must say) most dangerous consequences, as well as a total departure from principle, resulting from the notion that a Judge at Nisi Prius has any such power. The old legal principle should not be departed from, "*ad questionem legis Judices, ad questionem facti juratores, respondere debent.*" But there is direct authority on this subject. The question arose and was decided in the case of *Lumby v. Allday* (a). Had there been a nonsuit in the case now before us, *Lumby v. Allday* would have been upon the very point. The cases also of *Roach v. Johnston* and *Keenan v. Phillips* assert the doctrine that an objection such as this appearing on the record cannot be decided at Nisi Prius or on motion; there the objection

(a) 1 Tyr. 237.

was entertained at the trial and afterwards discussed upon motion, because the parties agreed to take that course.

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But it is said these cases do not apply, because the question before us arises not on motion, but on a bill of exceptions; but to me it appears that the case of a bill of exceptions is an *â fortiori* case. The error is the same, whether the party complains of it by way of motion, or by way of exception: the objection is not the less strong because it is put upon the record, and that is the only difference between this case and *Lumby v. Allday*.

The case of *Dicas v. Lord Brougham*, referred to in the argument, is a contrast to this case, and an illustration of it. There the learned Judge, Lord Lyndhurst, directed the jury to find for the defendant, upon the ground that the act of Lord Brougham was a judicial act. But in that case the declaration was a good declaration, being a common declaration in trespass for false imprisonment, and the direction was founded upon the evidence, and that evidence on both sides. If indeed the plaintiff had, by his bill of exceptions, passed by this objection, and taken his exception on a different ground altogether, that might require a different consideration; for since the case of *Trimleston v. Kemmis*, nobody doubts that it is the duty of a Court of Error to pronounce its judgment on each exception *seriatim*, and that if all the exceptions be overruled, the verdict must stand, unless there be error appearing on the face of the record; but if one exception be allowed, the verdict which is taken subject to the exception must fall when the exception is allowed; and it is an established rule that there can be no judgment after an issue in fact that is not founded on a verdict.

This then leads directly to the inquiry—do the exceptions in this case include the objection that the case was not allowed to go to the jury upon the plaintiff's evidence? The defendant gave none. Let us look then to the requisitions of the defendant's Counsel—the plaintiff's requisition to the Judge, and the charge thereupon to which the exceptions are taken.

Now, the requisition of the defendant's Counsel at the close of the evidence was to nonsuit the plaintiff, or direct a verdict for the defendant, not on the ground that the plaintiff's proof was variant

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from, or did not support, his declaration, but on the distinct ground “that the defendant, in refusing to receive the appeal, had acted judicially, and that therefore no action for such act was maintainable against him.” The defendant’s Counsel, on the other hand, insisted, that the refusal to receive the appeal was not a judicial act; and also called upon and required the learned Judge “to leave the consideration of the case upon the evidence to the jury, and required the Judge to tell the jury that, if they believed the evidence, they ought to find a verdict for the plaintiff.” Here are the two cases of defendant and plaintiff in contrast. The defendant says—“Notwithstanding the evidence, I am in law entitled to a verdict, because the action, as stated in the declaration, is not maintainable.” The plaintiff says—“The action is maintainable, and I desire the case to go to the jury upon the evidence; and that evidence supporting the declaration, I am, if the jury believe it, entitled to their verdict.” The Judge adopts the opinion of the defendant—he declines sending the case to the jury upon the evidence, and he directs the jury that in law the defendant, upon the declaration and upon the evidence, was entitled to a verdict. The words are:—“But the learned Judge refused so to direct the jury (*i. e.*, as the plaintiff called on him to do), or to leave the consideration of the evidence so given upon the part of the plaintiff to the jury, but directed them to find a verdict for the defendant.”

Now to me it is plain that the Judge was called on by the plaintiff to do one of two things—either to direct a verdict for the plaintiff, or to leave the case to the jury. He was, I think, quite right in refusing to direct the jury to find a verdict for the plaintiff, on the ground that the act complained of was not judicial, but ministerial. But I think he was wrong in not adopting the other course suggested by the plaintiff. He should have left the evidence to the jury, and told them if they believed it to find a verdict for the plaintiff. There are in effect two exceptions on the record: one is for saying that the act complained of was a judicial act; the other, for taking away from the jury the question entirely.

But it is asked—if the bill of exceptions in this case does not disclose a ground of action against the defendant, why have recourse to

the circuitry and expense of a new trial? May not, and ought not, this Court of Error at once to affirm a judgment to which the defendant will ultimately be entitled? I say in answer, we cannot do so unless we overrule the exceptions. But if we allow the exceptions (as I think we must), we set aside the verdict, and the judgment of the Queen's Bench must fall with the verdict on which it rested—a *venire de novo* is the necessary consequence. Nor can the defendant justly complain; if, as he now contends, this case should be ruled upon the vice of the declaration, he should have demurred to it, or, taking his chance of a verdict upon the issues knit, reserved his objection for a motion in arrest of judgment—the circuitry and expense are altogether his own choice.

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TORRENS, J.

In this case I am of opinion, upon both the exceptions on this record, that a *venire de novo* should be awarded.

I shall not enter into the discussion of those topics which have been adverted to by some of my Brethren, and which are of very great importance and delicacy, involving questions respecting the privileges of the order to which we belong; but which, in my opinion, and in the view I take of this record, are not applicable to the discussion of the present case. I shall therefore confine my attention to the record. I shall take the exceptions in their order; for in my judgment there are two, clearly separate and distinct in their nature, upon the document now before us.

On the first and material exception, namely, whether the rejection of this appeal was a judicial or a ministerial act, I am led to the conclusion that it was the latter, from the construction I put upon the statute which enables the Assistant-Barrister to act as a Judge, which prescribes his duties, and defines, in my judgment, what is a ministerial and what a judicial duty. On that point I shall refer to the 29th section of 36 G. 3, c. 25, regulating the office of the Assistant-Barrister, and shall endeavour to show what portion of that statute I consider to be mandatory in that officer to perform, as a *ministerial* act, and what it is directory on him to do as a judicial act. The 29th section of the statute

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 "made or pronounced by Assistant-Barristers, to appeal there-
 "from to the Judges of Assize: and such Judges of Assize are
 "empowered and required to re-hear the said cause, and to issue a
 "decree and execution thereon, which appeal the Assistant-Bar-
 "risters are hereby *required to receive, and stop all proceedings on*
 "the decree or dismiss pronounced." I hold, on this portion of the
 statute which I have read, that all discretion is taken away from the
 Assistant-Barrister as to the exercise of any judgment thereon,
 whether he will or will not receive the appeal. He is not only
required to receive the appeal (a very strong term), but to stop all
 proceedings; in those duties there is no room for the exercise of
 judicial discretion; the words of the statute are imperative: and,
 coupled with the requirement to receive the appeal, the statute
 commands him to do two acts, whereby the legality of his decision
 may be investigated, and which, if not complied with, his judgment
 becomes absolute, without any possibility of the suitor being able to
 question its rectitude.

Next follows in the same section the other prescribed duties which
 the Barrister is to perform after the appeal has been received. Upon
 all and each of those requisites which this section of the statute re-
 quires the Barrister to adjudicate, &c., I hold he exercises a judicial
 discretion, and it is his province and his duty to see that all those
 requisites are duly performed according to the provisions of the sta-
 tute, and the law of the Court, and upon which, though wrong, if he
 exercise his judicial discretion, he would not, in my judgment, be
 liable in an action for his alleged error.

I hold that there is a marked distinction taken in the statute
 itself between what are judicial and what are ministerial acts; the
 receiving the appeal and stopping the proceedings, I hold to be
 ministerial; adjudicating on the due performance of the requisites
 prescribed by the statute, I hold to be judicial. This appeal has
 been rejected, not on the ground that the requisites have not been per-
 formed; the complaint of the plaintiff is an absolute denial of letting
 the party enter into an inquiry whether the requisites had been

duly performed or not. On this ground therefore it appears to me that the plaintiff was justified in bringing his action for the refusal of the Barrister to perform a ministerial act.

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A great deal has been said upon the policy of protecting persons clothed with a judicial character, and high authorities have been cited to show that the judgment of persons exercising these functions should be free and uncontrolled. No doubt it is a very desirable policy of the law which establishes the independence of individuals clothed with a judicial character, and that they should be free, unfettered and unswayed by any influence operating on their minds. That is a most useful principle in the administration of justice; but there is also another principle equally, if not more, sacred in our constitutional jurisprudence, namely, that justice must not be denied to the suitor: *nulli negabimus justitiam*.

With regard to the second exception, I cannot read the record as construed by my Brothers MOORE and GREENE. I think the words are express, calling on the Judge to leave the case to the jury, and I cannot connect that requirement with the first exception, calling upon him for a direction to the jury to find for the plaintiff. They appear to be distinct from each other, and explicitly and separately stated on this record.

The question then is, did the Judge act according to the authority of decided cases in not submitting the case to the jury? I hold it is not the duty of a Judge at Nisi Prius to pronounce upon the validity or sufficiency of any pleading submitted to him, if the facts stated in the pleading are proved. *Lumby v. Allday* decides that. I therefore think that the Judge was bound to leave the case, as required by the exception, to the jury, and if the pleading be bad it will be disposed of in the Court above. The cases establish this as the correct practice, and I believe it has been a practice which has been generally, if not uniformly, followed.

I have come therefore to the conclusion that there should be a *venire de novo*, and that both exceptions ought to be allowed.

PIGOT, C. B.

One question which has been argued in this case is, whether the Judge at Nisi Prius is entitled, not only to consider the evidence, as

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tending, or not tending, to support the pleadings, but to form an opinion upon the validity of those pleadings, and to direct a verdict accordingly, although facts necessary to sustain the pleadings have been established in evidence? I think the objection founded on the direction of the learned Judge is not an immaterial or formal one, but is one of the most substantial kind. It is of the utmost moment that there should not be a doubt upon this subject, namely, that it is not according to the opinion which the Judge has formed at *Nisi Prius* that he should conduct the trial; but that the facts put in issue by the pleadings should be found *yea* or *nay* by the jury.

But it is urged, that if, upon the allegations in the plaintiff's declaration, he cannot have judgment, the Judge was substantially right in directing a verdict against him, and that to send the case to be again tried would be a useless circuitry, because, even if the plaintiff should obtain a verdict, judgment, after that verdict, would be arrested, and thus the result would be the same. I dissent from that argument.

In the first place, the result would *not* be the same; for it is not the right of a defendant, who has pleaded to a vicious declaration, to have judgment. If the defendant is resolved to take a course whereby to entitle himself to judgment, he is bound to demur. The law prescribes that course, in order to save his adversary the costs of a trial. If the defendant go to trial, and the verdict be against him, he must adopt one of two courses, in neither of which would judgment be given in his favour. He must either move in arrest of judgment, or sue out a writ of error. If the judgment be arrested, there would be no judgment and no costs. If he sue out a writ of error, the duty of a Court of Error would be to reverse that judgment, not so as to give judgment for him, but merely to reverse the judgment for the plaintiff, and the defendant would, in that case, get no costs of those proceedings. The result of holding that a Judge at *Nisi Prius* might *thus* at the trial give the defendant a verdict, would enable him to enlarge the defendant's rights and the plaintiff's liability, beyond the power which he, the Judge, would otherwise possess. It is important that in the administration of justice

the ordinary rules should be observed, which have been established by Courts in their efforts to preserve the rights of parties. The object of the Courts has been to raise a single, certain and material issue, whether of law or of fact—the law to be determined by the Court, the facts by a jury.

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Again, see what is the duty of the jury in such a case, imposed upon them by their oaths. They are sworn to give a true verdict between the parties, according to the evidence, leaving to the Judge the construction of the issue; but the jury are not absolved from finding on that issue, unless entirely absolved from giving a verdict. Allowing the Judge to tell the jury, that, though the facts in issue are proved, they must negative them by their verdict, and that, however true the allegations of the plaintiff are in fact, yet because they are insufficient in point of law, they must find, not a true verdict according to the evidence, but a verdict in opposition to the truth, as proved by the evidence, against what they have been sworn to find according to the truth, would in effect allow a Judge to coerce a jury to find against their oaths; and the cases cited by my Brother CRAMPTON illustrate the perplexity and confusion that would be caused by such a course of proceeding.

Further, if this course of proceeding were right under the general issue, why should it be otherwise when a special plea is pleaded, for instance, a plea say of accord and satisfaction, or of release? The same rules must apply to every form of action. Suppose, for example, an action of covenant:—the defendant is there entitled formally to traverse every material allegation in the declaration, (and the same observation applies to the general issue, when it can be pleaded, because it presents to the jury every fact as if specially alleged and denied); could it be said, that if a number of issues are joined in such a declaration, the jury are, on the trial, to disaffirm every issue, because, in the opinion of the Judge, the declaration discloses no cause of action? It appears to me that the Judge has no such authority. His business is to guide the jury in disposing of the issue. The Court of Exchequer in England have held that the Judge is bound to leave the whole of the question to the jury.

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But the case has been argued as if the Judge had expressed his opinion that, upon the facts in evidence, the defendant was entitled to a verdict. I am not quite satisfied that, from what appears on the present record, the Judge ought to be taken to have done so. I should be disposed to hold, that what the Judge did was, to tell the jury, that, upon the evidence, the defendant was acting as a Judge of a Court of Record, and that, as it appeared that he was so acting, he was not liable to an action, and that they should find their verdict accordingly. That being so, he did not direct the jury as has been alleged, or commit the misprision on which I have been commenting. In that view of the case, he must have told the jury that the facts were proved, but that the evidence established that the defendant was acting as a Judge of a Court of Record, and upon that evidence he was entitled to a verdict.

If that be the import of the case, and if that be the mode in which we are to construe this record, then it appears to me exposed to the charge of another infirmity, which my Brother PERRY has satisfactorily expounded; for then it would come to this:—that irrespective of the question whether an Assistant-Barrister had or had not assumed the duty of considering the appeal, and whether or not his object was to frustrate the appeal, he was in that view, as a Judge of a Court of Record, exempt from responsibility. I think that proposition of law cannot be sustained. It cannot be sustained, in point of law, that the Assistant-Barrister, because he is an Assistant-Barrister, is exempted from responsibility for refusing to consider the appeal. I hold, that an action does lie against him for refusing to undertake the duty of considering the appeal. I do not think it necessary to say whether, after he had entered into the consideration of it, he was acting judicially or not. It is not necessary to determine whether, if he had considered the validity of this affidavit, his duty, in so considering it, was judicial or ministerial. I am satisfied that the provision of the statute, requiring him to *undertake* the duty, makes the undertaking of it obligatory, and so far ministerial, that disobedience of that provision would expose him to an action, without at all affecting the general

rule, that a Judge should not, in doing any thing in performance of his judicial functions, be held liable to an action. T. T. 1852.
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The liability appears to me the same in the case of an Assistant-Barrister refusing to take an appeal, as a Judge refusing to receive a bill of exceptions. For the purpose of pointing out the analogy, I shall assume that an action lies against a Judge, not for refusing to seal a bill of exceptions, but for disobeyng the writ, which the party, who tenders the bill of exceptions, is entitled to issue under the Statute of Westminster 2; though I think there is a great deal in what has been said by my Brother PERRIN, to show that an action would lie against a Judge for the act of refusing to seal (or, in Ireland, to sign) the bill of exceptions, when properly tendered to him. But even though the action sustainable against a Judge is, properly, an action for not obeying the writ, still it is in effect an action for not obeying the provisions of a statute which imposes on him the obligation of complying with the writ. The action, at the suit of a party aggrieved by the non-performance of a duty prescribed by an Act of Parliament is an action at Common Law. In the case, supposed, of a Judge sued for a disobedience of a writ issued under the Statute of Westminster, the duty which he is sued for violating is one which appears to me to partake of a judicial character, much more than that of undertaking the consideration of the acceptance or refusal of an appeal from the decision of an Assistant-Barrister. The Judge, when a bill of exceptions is tendered, must consider whether the evidence, as set forth, was the evidence given at the trial; whether the points of law raised by the bill of exceptions tendered are those which were raised at the trial; whether his charge or direction to the jury has been truly set forth as to the matters which are the subject of exception; and a variety of other matters, all requiring judicial knowledge of the case, and the exercise of judicial judgment, especially in a case of complicated facts, or one in which the law is doubtful. In the case of an appeal from the decision of the Assistant-Barrister, nothing is to be determined, with a view to the acceptance or rejection of the appeal, but whether certain requisites have or have not been complied with. It may be urged, that, in determining

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whether the bill of exceptions be properly framed, or whether the requisites of the appeal have been complied with, each functionary has to perform a judicial duty. But whether the *undertaking* of that duty be, or be not, a judicial act, or be, or be not, ministerial only, it appears to me perfectly clear that an action lies, at Common Law, in each case, for frustrating that course of justice towards the review of a decision of a Judge, which is prescribed by the positive provisions of an Act of Parliament. Whether an Assistant-Barrister, up to the point of beginning to exercise the jurisdiction of determining upon the validity of the requisites for the appeal, is acting ministerially, or acting as Judge, the Common Law of the land, which declares that a Judge who disobeys the Statute of Westminster in voluntarily declining to do an act necessary for the reviewing of his decision, and thus frustrates the ends of justice, is liable to an action for that default, must also declare that an Assistant-Barrister who disobeys the statute 36 G. 3, with a similar result as to his decision, is also, for that default, liable to an action. I therefore say that, whether he is to be regarded as acting ministerially until he begin to assume jurisdiction in determining the validity of the requisites of the appeal, or acting as a Judge, the law of the land, which says that a Judge, who disobeys the Statute of Westminster in omitting to perform a necessary act, and thus to frustrate the ends of justice, is liable to an action; that that applies equally to the provisions of the statute 36 G. 3, and the acts of an Assistant-Barrister under it, as a Judge to whom a bill of exceptions has been tendered, has also an elaborate duty to perform. Adopting therefore on this point of the case the judgment of my Brother PERRIN, and the comprehensive reasons he has assigned, I am of opinion that the action does lie, and that the question raised was not whether or not what the Assistant-Barrister did was a wrong exercise of his jurisdiction in refusing the appeal, but that there was a question whether or not he entirely repudiated these functions cast upon him by the Act of Parliament? Therefore, assuming the direction to have been that, upon the evidence before the jury, the fact of the judicial character of the defendant's acts constituted a defence, I am of opinion that the charge in that

view was erroneous, and that the judgment of the Court below, which sustained it, was erroneous, and ought to be reversed.

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MONAHAN, C. J.

In this case, as my opinion coincides with that of the majority of the Court, it is not necessary that I should do more than shortly state the reasons which have induced me to come to the conclusion that there ought to be a *venire de novo*.

First then, I think there has been a miscarriage at the trial in this case. There was no objection taken at the close of the plaintiff's case, that the allegations in the declaration had not been proved. Had such objection been made, it would have been competent for the plaintiff, with the permission of the Judge, to have given further evidence to supply the defect. The objection taken, as it appears on the record before us, amounts to this, that it appears on the declaration that the action does not lie, and therefore that the defendant was entitled to a direction to have a verdict found for him. If this be the true state of the record before us, there is no foundation for that portion of the argument of the *Attorney-General*, for the defendant, that it appeared that the several requisites necessary to entitle a party to an appeal had not been complied with by the plaintiff; for that is not the meaning of the objection—it is this, that upon the case stated and proved, the defendant was an Assistant-Barrister, and the act complained of was done by him as such; therefore the act was a judicial act, and no action could be maintained against him.

That being so, the question arises, whether, assuming that all the facts stated in the declaration had been proved, was the Judge justified, in an action such as the present, in withdrawing the case from the consideration of the jury by directing a verdict for the defendant? It appears to me that the cases which have been referred to by my Brother CRAMPTON are conclusive on the subject. The case of *Lumby v. Allday* rules this point. It may be said there is a distinction between that case and the present, there being in that case a nonsuit; but I do not see any ground for a distinction between a nonsuit and the directing a verdict for a defendant. A nonsuit is

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directed where a party has failed to prove his cause of action, but he cannot be nonsuited against his will; and in case he does object, the course is to direct a verdict for the defendant; that case therefore is an authority on the present question. This is not like the case of *Dicas v. Lord Brougham*, because, in that case it does not appear on the declaration that the defendant acted as a Judge. Neither will this rule apply to an action of assumpsit, where you proceed upon an implied promise; because if you state an insufficient consideration, and there is no express promise, the law will not raise a promise, and the defence will be open under the plea of the general issue. I therefore think there has been a miscarriage.

I then come to the next objection, which is, that this objection was not taken at the trial. I think it very probable that the present objection was not expressly taken; still it appears to me to be open under the terms of the objection actually taken. A party at the trial is only bound to call on the Judge to do what he considers right—he is not bound to argue the case at length, or put his reasons on the record—that remains for the Court above. A bill of exceptions need contain only what the Judge did, and what he was required to do, and what he refused to do. Here the Judge was required to do what he ought to have done, namely, to leave the case to the jury, and tell them, if the evidence supported the declaration, to find for the plaintiff.

But it has been suggested, even though the exceptions be well founded, the Court should affirm the judgment, the declaration being bad on demurrer. I do not accede to this. In my opinion, if this be a well founded exception, the Court can do nothing but allow the exception, and award a *venire de novo*. *Lord Trimleston v. Kemmis* decides that. I am aware that this is a Court of Error, and that we must see that there is error in the judgment. But that rule does not apply to a case like the present. The allowance of the exceptions disposes of the verdict; and that being so, the Court cannot be called on to give judgment on an issue not yet determined: therefore even though I came to the conclusion that this declaration was not maintainable in point of law, I still would hold that there ought to be a *venire de novo*.

But it is not necessary for me to ground my judgment on this point, as I am of opinion that the declaration is not bad on general demurrer; as although I am of opinion that some portion of the duties of an Assistant-Barrister in receiving and taking the appeal are judicial, yet in my opinion the refusal to enter into the consideration of it is plainly ministerial. The mere receiving, or swearing the attorney to the affidavit, which is preliminary to the application to receive the appeal, cannot be said to be a judicial act. Suppose the declaration stated merely that the Assistant-Barrister refused to take the affidavit, whereby the party was unable to apply to have the appeal received, that would, in my opinion, be a good declaration. And if a declaration in an action on the case contain several allegations, if any one of these allegations would constitute a cause of action, proof of such allegation is sufficient to sustain the verdict. It is in my opinion a mistake to suppose that, because a man is a Judge, every act imposed on him must be of a judicial character. Here the defendant refused to administer the oath to the plaintiff's attorney, which the Act of Parliament required him to do, without leaving him any discretion on the subject; as it is quite a mistake to suppose that the Assistant-Barrister would be justified in refusing an appeal because in his opinion it was brought for delay. And in the administering of this affidavit he would, in my opinion, be discharging not a judicial, but a ministerial, act; and for his refusal to do so he would, in my opinion, be liable to an action, and therefore a *venire de novo* should be awarded.

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LEFROY, C. J.

This case comes before the Court upon a writ of error from the judgment of the Court of Queen's Bench. The question to be decided depends upon the charge of the learned Judge who tried the case: if his charge was right, the judgment should be affirmed; if his charge was wrong, the judgment should be reversed, and a *venire de novo* awarded, provided there be no ground, independent of the exception, upon which this Court should be called upon to give any other judgment upon the whole of the record.

The first question is, was the direction of the learned Judge

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right? and were the premises on which it was founded warranted in point of law? It assumes four propositions:—first, that the defendant, as an Assistant-Barrister, was a Judge of a Court of Record; secondly, that as such he was not liable to an action for the matter complained of; thirdly, that in refusing to receive the appeal he acted judicially, and not ministerially; and fourthly, that this was a case proper for a direction, and not (as insisted on by the plaintiff's exception) fit to be left to the jury upon the evidence generally.

As to the first point—that the defendant was an Assistant-Barrister is an admitted fact on the record, and that as such he was a Judge of Record, and entitled to the full privilege of such, appear clearly from the Civil-bill Acts. This jurisdiction was originally vested in the Judges of Assize by the 2 G. 1, c. 11; by the 7th section of which it was enacted that the Court held by the Judges for hearing and determining causes in a summary way by English bill shall be a Court of Record; and by 36 G. 3, c. 25 (by which the jurisdiction is transferred to the Assistant-Barristers), it was enacted, by section 6, that they should exercise in all respects such jurisdiction and powers concerning the said English bill as the Judges of Assize are empowered to exercise on their respective circuits. They are thus put on the same footing as Judges of the Superior Courts. And by section 16, it is enacted, that the Court held by the Assistant-Barristers for hearing and determining causes in a summary way by English bill shall be a Court of Record; and by section 40, they are to be sworn to exercise the office of Assistant-Barrister diligently, justly and impartially, and without favour, affection or malice; to do equal right to all the King's subjects that shall come within his jurisdiction, and in all things, to the best of his skill and power, faithfully and diligently execute the duty imposed on him by the said Act; thereby entitling him to every presumption in favour of a sworn Judge of Record. And by a very recent statute, their tenure of office is put on the same footing as that of the Judges of the Superior Courts. Thus it appears to me that all the ingredients which, according to the authorities, entitle a Judge to this privilege of protection, concur in the office of Assistant-Barrister—he is a

sworn Judge of Record—he has all the powers, authorities and *status* of a Judge of the Superior Courts.

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This brings me to the second point, namely, what is the nature and extent of this privilege? and upon what authority does it rest? I shall begin with the case of *Garnett v. Ferrand* (a), where the question arose upon an action against a Coroner. Lord Tenterden there says:—"The Court of the Coroner is a Court of Record, of which the Coroner is the Judge; and it is a general rule, of very great antiquity, that no action will lie against a Judge of Record for any matter done by him in the exercise of his judicial functions." And for this he cites the cases of *Floyd v. Barker*; *Poole v. Gwynn*; *Groenveldt v. Burwell*, and *Hamond v. Howell*. He then observes:—"This freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sakes as for the sake of the public, and the advancement of justice—that being free from actions, they may be free in thought, and independent in judgment, as all who are to administer justice ought to be; and it is not to be supposed beforehand that those who are selected for the administration of justice will make an ill use of the authority vested in them." He adds, in a subsequent part of his judgment:—"It is not to be expected that any person will act at the peril of being harassed by a multiplicity of actions, and of having his reasons and motives weighed and tried by juries at the suit of individuals who may be dissatisfied with his conduct." It will be found on reference to the cases cited by his Lordship, that he has collected from them most accurately the principle and ground of this privilege. It has however been said that, even by the admission of Lord Tenterden, the present action may be maintained, for that he has said in another part of his judgment, "Corruption is quite another matter, so also is neglect of duty or misconduct in it. For these I trust there is, and always will be found, due course of punishment by public prosecution." But on reference to the immediately preceding context, the observations will be found to apply to Judges and Courts not of Record. His Lordship, having begun with Courts of Record, and stated their pri-

(a) 6 B. & C. 625.

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vileges, adds:—"Even Inferior Justices, and those not of Record, cannot be called in question for errors in judgment, so long as they act within the bounds of their jurisdiction." And he gives the reason why even they to a certain extent should be protected, and then adds:—"But corruption is another matter, so are also neglect of duty and misconduct in it; for these I trust there is, and always will be, some due course of punishment by public prosecution." But even as to these, not by action, but by public prosecution; and, accordingly, though we find many instances of indictments and criminal informations against Judges of Inferior Courts for malversation in their office, but none, I will venture to say, against a Judge of a Court of Record, at all events, the question in this case relates to an action, and not to a public prosecution.

He refers to some of these long established authorities from which he says he derives the rule: *Floyd v. Barker*, and *Howell v. Hamond*. I refer to these cases shortly, but necessarily, because they more distinctly develop the reason, not only the reason, but how it is that this privilege is carried out to work its effects of protection. In *Floyd v. Barker* (a) the law is thus laid down in the third resolution:—"The Judge, be he Judge of Assize, or a Justice of the Peace, or any other Judge, being a Judge by commission and of Record, and sworn to do justice, cannot be charged for conspiracy for that which he did openly in Court as a Judge or Justice of the Peace; and the law will not admit any proof against this vehement and resolute presumption of law, that a Justice sworn to do justice will do injustice." It is *presumptio juris*, not to be gainsayed; and that, as Lord Tenterden observes, "Not for the sake of the Judge, but of the public, and for the advancement of justice, that being free from actions they may be free in thought and independent in judgment, as all who administer justice ought to be." And if this applies to Judges of the Superior Courts, how much more strongly to the Judges of a Court constituted as that of the Assistant-Barrister, if they were to administer justice at the peril of what the suitors in their Court may think, or what prac-

(a) 12 Rep. 24.

tioners of the Court may advise their clients to do in order to coerce the Judge?

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Another case to which Lord Tenterden refers at some length, is *Hamond v. Howell* (a). That was an action for false imprisonment against the Recorder of London, as one of the Judges in the Commission at the Old Bailey, for imprisoning the plaintiff. A special plea was put in, stating, that he and the other Commissioners had fined the jury, of whom the plaintiff was one, and committed them for not giving a verdict according to the direction of the Court in matter of law, and against plain evidence. The plaintiff traversed the finding against plain evidence, to which there was a demurrer by the defendant; and it was held upon these pleadings, that the action did not lie, because the defendant was a Judge of Record. The Counsel for the defendant admitted he could not support the act of the Judge in fining the jury, as it had been solemnly decided by all the Judges of England in *Bushel's case* to be contrary to law; but contended that no action would lie against him for so doing, because it is done as a Judge. The Court told him he need not labour that point, but desired to hear the argument at the other side, and all the arguments we have heard in the present case were addressed to the Court. It was contended, that what was done was not warranted by the commission, and therefore the defendant did not act as a Judge, as here. It was contended that it was not a judicial act. All the other arguments of hardship and inconvenience were urged; but the whole Court gave judgment against the plaintiff; and the decision of the Court amounted to this—that no action will lie against a Judge of Record for a wrongful commitment any more than for an erroneous judgment. They say there is no instance of such an action, and they observe, in accordance with that principle to which I have adverted, as laid down by Lord Coke, “That if the Judge have done any thing “unjustly or corruptly, complaint may be made to the King, in “whose name judgments are given, and Judges are by him delegated to do justice.”

In the case of *Groenveldt v. Burnell* (b), the law was laid down

(a) 2 Mod. 218.

(b) 1 Salk. 396.

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in like manner by Lord Holt, and I believe it will be admitted that his judgments were those of a liberal and independent, as well as an able and upright, Judge. What does he say on the subject?—"A Judge is not answerable either to the King or the party for the mistakes or errors of his judgment in matters of which he has jurisdiction. It would expose the justice of the nation, and no man would execute the office on peril of being arraigned by action or indictment for every judgment he pronounces. If a Justice of Peace record upon his view that as force which is no force, he cannot be drawn in question either by action or indictment." And he cites a case (*a*), where a Judge of Oyer and Terminer caused a finding to be entered as a felony, though the jury presented that fact only as a trespass; and yet he could not be punished by indictment or otherwise, because he was a Judge of Record. This case of 27 *Ass.*, p. 19, is given in *Salk.*, and is cited by Holroyd, J., in *Basten v. Carew* (*b*) as an authority.

In the celebrated case of *Money v. Leach* (*c*), Lord Mansfield says:—"The privileges given to Justices by the statutes relied on are only given them in their capacity of conservators of the peace, not as Judges of the Court of Record, for what they do there can never be the ground of an action." Again, the same distinguished Judge, in the case of *Mostyn v. Fabrigas* (*d*), says:—"By the law of England, if an action is brought against a Judge of Assize, for an act done by him in his judicial capacity, he may plead that he did so as a Judge of Record, and that will be a complete justification."

The next case to which I shall refer is *Dicas v. Lord Brougham* (*e*), an authority which appears to me to run *quatuor pedibus* with the present case, not only as to the law of the case, but also as to the mode in which the learned Judge has dealt with it. It was an action for false imprisonment of the plaintiff, under warrant of committal of Lord Brougham, founded on orders in bankruptcy, which it was insisted were irregular and illegal. The plaintiff went into evidence

(*a*) 27 *Ass.* 19.

(*b*) 3 *B. & C.* 656.

(*c*) 1 *W. Bl.* 560.

(*d*) *Cowp.* 172.

(*e*) 6 *C. & P.* 249.

to show that the warrant for commitment was illegal, there having been no demand under the previous order for payment. There were other circumstances in the case, which it was insisted upon made it a case of peculiar hardship: amongst others, it was said, that the Chancellor, by discharging the first order of committal as irregular, had decided the case against himself as to both orders. For the defendant, the Solicitor-General called for a nonsuit, on the ground that no irregularity had been proved. Lord Lyndhurst appearing to be against him on that ground, he then insisted that whether the proceedings were regular or irregular it made no difference. He says:—"Let it be supposed that an irregular order was made, or an irregular warrant issued, does an action lie against a judicial officer?" Lord Lyndhurst then says:—"Why did you allow the evidence to go on? This was an order pronounced judicially, and this warrant is founded on a judicial order; how can an action of trespass lie after that?" The Solicitor-General then proceeded to cite the cases on the subject. For the plaintiff it was then contended that these cases applied only to a Judge of a Court of Record, but that the Chancellor sitting in Bankruptcy is not sitting in a Court of Record; and also contended that the defence could not be made under the general issue. The Solicitor-General, in reply, contended, that when the act was done by a party as a Judge, he need not plead specially; but if the party be a ministerial or magisterial officer, he must plead specially, as is done in the case of sheriffs, and as was done in the case of *Abbott v. Lord Halifax*; and was proceeding, when he was stopped by Lord Lyndhurst, saying:—"I have had no doubt upon this from the first; I am clearly of opinion this action cannot be maintained. The Lord Chancellor was sitting in Bankruptcy when these judgments were pronounced; and even supposing these judgments to be erroneous, they cannot be questioned in a Court of Law. With respect to the other point, there is no necessity for a special plea; the general issue is quite sufficient, as no action will lie." He accordingly directed the jury to find for the defendant.

The next cases we have are those which occurred in our own country. The first of these is *Taaffe v. Lord Downes*, where my

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Lord Downes, with the best advice, and a sense of what belonged to him in respect to his office, took the course that has been taken here; he virtually took the same course; he rested upon that protection, that it was his duty on behalf of his office and the law to maintain, his irresponsibility. An action was brought against him for having issued a warrant in Chamber, and he pleaded that he did so as Chief Justice of the Queen's Bench. To that there was a demurrer, and the demurrer was overruled, and a decision made, that the Judge, when he did what he did, was a Judge, and acting as a Judge of a Court of Record, and he had protection that defended him from any other species of defence. He purposely omitted in the plea a statement of facts, that there was a previous information lodged on which he issued it; and therefore he put on his plea wilfully and designedly that which made it for any other person a bad defence, but which, for a Judge of the land, was a good defence, because what he did he did as a Judge of the land.

The next case was that before Chief Justice Bushe, in the case of a Seneschal. An action was brought against a Seneschal, where he held that he acted judicially, and was not subject to the action. And that same case arose before the no less eminent lawyer the late Serjeant Warren, and is reported in 3 *Crawford & Dix*, p. 38. He took time to consider of it, and he gave a lengthened and, in my mind, a very satisfactory judgment, as the foundation of the opinion which he held. He might have satisfied himself merely by the authority of Chief Justice Bushe, but he thought it right to examine the case for himself, and he gave the reasons for that opinion. The case having been argued there, as it was here, that the defendant was guilty of neglect of duty as a ministerial officer, neglect of duty as here, he said:—"The question here is, whether the Seneschal was "acting beyond and without his jurisdiction, or within it? If he "was acting without jurisdiction, I think that a civil-bill would lie." Then he quotes a case before Lord Hale, and says:—"But if the "Seneschal was acting in a matter within his jurisdiction, an action "at law does not lie for the abuse; and that, as a general proposition, is recognised by all the Judges."

If these cases establish that the defendant, as the Judge of a

Court of Record, is not liable to an action for what he does judicially, the next question (which is the third) is, whether, in respect to the matter complained of, he is to be deemed as acting judicially or only ministerially? This part of the case turns upon the 29th, 30th and 31st sections of the Civil-bill Act (36 G. 3, c. 25).

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By section 29, after giving the right of appeal to the Judge of Assize by any person who shall think himself aggrieved by any decree pronounced by the Assistant-Barrister, it proceeds:—"Which appeal the Assistant-Barrister is hereby required to receive, and stop all proceedings on the decree or dismiss, the party appealing, if a defendant, first paying the plaintiff the costs allowed by this Act, or depositing the same with the Clerk of the Peace, and entering before the Assistant-Barrister into recognizance for double the sum decreed against him, with costs, in case no relief shall be had on the hearing of such appeal." Then follows the provision in case the appellant shall be a plaintiff. Then by section 31 it is provided, "That no Assistant-Barrister shall receive any appeal, unless the attorney who appeared at the hearing of the cause for the party desiring to appeal shall first make affidavit in writing before such Assistant-Barrister that such appeal is not, as he believed, made or to be made for the purpose of delay, but that he believes there is reasonable and probable cause of reversing the decree or dismiss."

No doubt the Assistant-Barrister is required to receive the appeal, but it is equally clear that certain preliminaries must be observed; and who is to decide whether these preliminaries have been performed, or performed in the manner and according to the object of the Legislature in requiring them? Some of these matters no doubt are defined, and involve no consideration or exercise of judgment or discretion, such as the amount of the security, the number of the bail, and such like; but is he not also to decide upon and judge of their sufficiency?—is he not also to exercise a judgment on the sufficiency of the affidavit, and on the fact whether the appeal is for delay? Suppose something appeared in the course of the cause to satisfy him beyond all doubt that the object of the appeal was only delay, and with a view to frustrate the ends of justice by mak-

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ing away with his effects, or in some other way, has he no judicial discretion? Does his judicial duty end until he has decided whether he will grant execution to the party in whose favour he has decided, or withhold it at the instance of the party against whom he has decided? The moment he gives the right to the one to appeal, he is taking from the other the right to execution; and if the one may bring an action against him for not receiving the appeal, why may not the other bring an action against him for receiving the appeal? Why is it not just as much a judgment for the one as it is against the other? And if it be a judgment by which one or the other may be prejudiced—if one is entitled to bring an action because he did not receive the appeal, why may not the other bring an action and say, going through every one of the items, the affidavit was not full enough, the bail were not solvent enough, the costs were not deposited as they ought to be, it was for delay, and you ought to have been aware of that from what appeared on the trial before yourself; you therefore wrongfully and injuriously stopped these proceedings; you did so wrongfully and injuriously, and against your duty? And thus in every case which the Barrister has to try, he will be subject to the action of the party against whom he decides, in respect to the discharge of this part of his duty. Why allow an action to be maintained for what he thus does, by alleging that he has done it wrongfully, against his duty, and with intent to injure, and not allow an action for his decision of the case, by alleging that he decided wrongfully, against his duty, and with intent to injure the party against whom he decides?

It has been argued that he acts judicially as to a certain part of his duty—that is, in making a decree; but in giving or withholding execution he is only a ministerial officer. But what is there in the Act to warrant that proposition? He is Judge from first to last; and it is to the Judge the privilege and protection is given, whether the act is ministerial or judicial. But it is a judicial act, if there was any value to be set upon that; for it is an act which comes within the language of Lord Tenterden, in *Garnett v. Ferrand*:—"Any matter done in the exercise of his judicial functions."

But it has been argued that as the Sheriff may, in certain cases,

receive the appeal, and in so doing act ministerially, that the Assistant-Barrister must, in respect to the same duty, be deemed to act ministerially; but that is just the distinction. The Assistant-Barrister can act in no capacity but that to which the Act appoints him, and that is as a Judge; but the Sheriff is an officer independent of the Act, and only a ministerial officer. The authority to discharge a duty under an Act of Parliament does not make him a Judge, or prevent his being liable to an action for misfeasance in his office. He is not (as Lord Holt said in *Ashby v. White*) a Judge, nor any thing like a Judge—he is a ministerial officer. The same distinction was taken by Lord Kenyon on the same ground. The Legislature itself has in this Act made a marked distinction between an appeal before the Assistant-Barrister and an appeal lodged with the Sheriff. In the one case it is sufficient to give security to abide the decree; but in the other the sum decreed must be lodged with the Sheriff. Now what is obviously the reason of the distinction? It is no other than this—that in the case of an appeal received by the Assistant-Barrister, there is his judgment, that it is not for delay, that the bail is sufficient, and that all the other preliminaries have been duly complied with. But as in the case of an appeal lodged with the Sheriff, there is not that security; and the Legislature therefore provides that the money shall be lodged in the hands of the Sheriff, who, as a mere ministerial officer, can exercise no judgment in the case.

There is an observation which may be made here, though perhaps somewhat anticipatory of another point of the case:—A question was made here with respect to the practice of the Court as to the time for tendering these documents, to constitute the foundation of the appeal. Has the law settled any time within which these documents should be tendered? Who is to settle the time? Is not the Judge of the Court? Has he not a right to settle the practice of his own Court? What does Lord Lyndhurst say, in the case already referred to (*Dicas v. Lord Brougham*)? When it was relied upon that the Lord Chancellor had in that particular instance altered the practice of his Court, and stress was attempted to be laid on that, Lord Lyndhurst asked, “Has not the Lord Chancellor the power of

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altering the practice of his Court?" Mr. Platt replied, "That by a general rule he had." But Lord Lyndhurst replied, "I have no doubt he has authority for altering in a particular case the practice." But if it is to be altered, who is to judge of that? who is to decide upon the proper time for receiving these documents? If he is a Judge, who has a right to settle the practice of his Court? or has he a right in particular instances to say, "I will not now carry out my general rule of practice—I will not do it?" Is he not to be trusted to that extent, if on particular occasions he thinks it not right to do so; and to say, "If it were only to put a stop to this mischievous practice of postponing these things to the last, I will not receive this appeal; this practice has gone too far, of tendering these documents so late, I will not receive it now?" Was he not acting judicially? Was it not a matter of practice for which he had authority?

Now, with respect to the nature and quality of all these acts, taking it that we are to examine whether these acts themselves are ministerial or judicial; and when it comes to be settled whether they are ministerial or judicial, who is to be the judge of that? Is it the jury or the Judge? A case however of great celebrity has been referred to, with a view to establish the point that, although the Assistant-Barrister, as to certain parts of his duty, must be admitted to act judicially, and entitled to the protection of a Judge of Record, he must, as to the matter in question, be considered as a mere ministerial officer. No doubt, a very able and imposing use has been made of it in the argument at the Bar, as well as in the judgments that have been given in this Court—the case I allude to is *Ferguson v. The Earl of Kinnoul*.

Before I proceed to examine that case, I would first take the liberty to make this observation, that in general there is no more dangerous ground for a judgment than *dicta* taken from any case, however high the authority, without adverting to the nature and particulars of the case, the very point the Court had to decide, and the facts on which it was decided.

Now what was that case? It was a case in which the House of Lords had to dispose of a question of Scotch Law, respecting the duty

of the Presbytery, to whom it belonged, to receive for trial and to decide upon the qualifications of a presentee to a living. A suit was instituted in the Court of Sessions against the Presbytery for refusing to receive the presentee on trial of his qualifications; and it was by decree of that Court solemnly decided that, in so refusing, the Presbytery had acted illegally, and they were ordered to admit him. Upon an appeal to the House of Lords that decree was affirmed, and a peremptory order for his admission to trial was made and served on the Presbytery, who still persisted in their refusal. In consequence of which a suit was instituted by the patron (the Earl of Kinnoul) and his presentee, against the Moderator (Dr. Ferguson), and the other members of the Presbytery, for damages, in which an interlocutory judgment was pronounced, declaring that after the judgment of the Court of Sessions, it was not competent to the Presbytery to refuse receiving the presentee for trial, and decreed that he and the patron were entitled to damages. From that interlocutory order there was an appeal to the House of Lords, who affirmed the judgment, which is the case referred to in 9 *Clarke & Finnelly*.

Now to make that case an authority applicable to the present, it should be shown that it had already been decided between the same parties (or at least on some other occasion), by the House of Lords, that an Assistant-Barrister was bound to receive an appeal, and that in contempt of that decision he had in the very same case, or at least under similar circumstances, refused to receive an appeal. The very defence on the record in that case was, "that it was *res judicata*" (p. 256). That was also the express ground of the judgment appealed from; and, unless I mistake plain language, was the ground of the judgments of the noble Lords who affirmed the decree below. I admit there are passages expressed in general terms which might be strained to embrace a case like the present; but they will appear to be so qualified by other passages as to show they are not fairly applicable to the present case, and that it was not the intention of their Lordships to overrule the law as laid down by Lord Tenterden—"That a Judge of Record has, by the law of England, "protection from liability to action for any matter done by him in

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“the exercise of his judicial functions.” The occasion did not call on them to pronounce any judgment on such a case. They were administering justice in respect to an Ecclesiastical Court in Scotland; and, be it noted, that by the law of England, a Judge in the Ecclesiastical Court in England is liable to an action for malversation—he is not treated by the law of England as a Judge of a Court of Record—and therefore if they had even in their minds a reference to the law of England, they had a warrant for their judgment in the law as to our own Ecclesiastical Courts. But are the passages cited from that case to be taken separately, and detached from the other passages to which I am now about to call attention? Now, to begin with the Chancellor (Lord Lyndhurst), p. 287, how does he open the case? “There is one point which is perfectly clear, and that forms “the basis of the whole proceeding: it is perfectly clear that it was “the duty of the defenders to take Mr. Young on trial of his qualifications as presentee to the church of Auchterarder; that question “was decided by the Court of Session. It afterwards came before “your Lordships’ House by appeal, and you confirmed the decision. “The law therefore was established by that decision, and it could “not afterwards be controverted. It admitted of no further question, “no further appeal.” He says in another place (p. 281):—“What “is the argument of the appellants in this case? It is said that this “was the decision of a Court—the Court of Presbytery—that the “members of the Court were acting judicially, and that acting “judicially, therefore if they committed an error no action can be “maintained against them. I do not deny that principle as a general principle; and if they had admitted that gentleman to his trial, “and after taking him upon trial had come to the conclusion that “he was not properly qualified, in that case it would have been a “judicial decision, and might not have afforded a ground for supporting an action, although the party should have sustained damage “in consequence of it. But that does not apply to the present case. “Here they had no discretion to exercise—they had to form no “judgment—they were bound by the law to do the act; they could “appeal to no tribunal. It was imperative on them to accept the “party upon his trial; it was their public duty. It bears no ana-

“logy, no resemblance to a judicial decision.” And in p. 293, Lord Brougham says :—“No discretion is vested in them to refuse the trial; the law has been declared generally, and in this particular case. The Court below and your Lordships have decided that there is no such discretion, and that the Presbytery is bound, without any option, to take the presentee on trial.”

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The judgment (that is of the Court below) affirmed by the House of Lords, by its form as completely negatives the taking on trial to be a judicial act, as it distinctly declares the Presbytery, in refusing a trial, to have been acting in a capacity other than judicial, as if it had in terms negatived the one of these propositions, and affirmed the other. It is true the possibility of a question being raised, even as to the Judges of Superior Courts, is put by him in what he himself terms a forced and extreme case, but which is not followed, nor at all concurred in, by any thing that fell from the other Law Lords, nor was it at all necessary for the decision of the case. What is the ground taken by Lord Cottenham? He says (p. 306) :—“The principal ground of defence relied on was, that they were exercising certain judicial functions, which, as a Court, they were competent to exercise, and that therefore they were not liable if they had fallen into error in the exercise of their judicial functions. The interlocutor, in the Auchterarder case, affirmed by this House, excludes any such ground of argument;” and Lord Campbell (p. 312) :—“Where the Presbytery is acting judicially, or in any matter where its members have a discretion to exercise, no action could be maintained against them, at least without malice expressly charged and clearly proved.” Even with respect to Ecclesiastical Judges, in Scotland, without malice being expressly charged and clearly proved, he would not hold them liable to an action by the law of Scotland. It is, I am persuaded, stretching his Lordship’s authority much beyond his intention to apply this passage in support of the action in the present case. Indeed from what follows immediately after, I doubt the accuracy of the report as to this passage, for he immediately afterwards says :—“If they had taken Mr. Young on trial, and adjudged that he was not qualified, from being *minus sufficiens* in

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 “was well qualified and free from all objection. Here we have no
 “exception of malice expressly charged and clearly proved.” Again
 he says:—“As to the ministerial act, which may be initiatory to a
 “judicial proceeding, he is not yet clothed with the judicial cha-
 “racter.”

Are we to say, in the case before us, that the Assistant-Barister is not clothed with the judicial character from first to last? I can have no hesitation therefore in saying that, whether we look to the point decided in that case, or to the judgments pronounced on the occasion, we are not to take it as a guide for our judgment in a case such as we have before us. It is for the House of Lords to say whether they will apply that law as it is pressed upon us to the Courts of Record in England and Ireland. But until they do so, in my humble judgment, it cannot authorise us to deprive the Judges of the land of the protection and privilege to which they have hitherto been entitled under the law, for the benefit of the law itself and of the public.

There was another matter introduced in the discussion of this case as furnishing an argument from analogy, and that was the supposed liability of the Judges to an action for not signing a bill of exceptions. That I confess has always appeared to me as the kind which may be said to be *ignotum per ignotius*. But it has already received so full an answer by the observations of those who preceded me, that I do not think it necessary to go into it further.

I have now disposed of the principal points in this case, arising on the charge of the learned Judge at the trial, namely the privilege of the defendant, as the Judge of a Court of Record, in respect to the act complained of, as done in the course of a judicial proceeding. But it has been further contended (and this rather on the Bench than at the Bar), that he is not entitled to take advantage of this defence by a direction to the jury; that as the point was open on the record, the defendant being sued as Assistant-Barrister, the case should have been sent to the jury and the defendant left to

move in arrest of judgment; and this brings us to the fourth point I proposed to discuss.

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This objection has been rested on the authority of the case of *Lumby v. Allday*, in which the learned Judge nonsuited the plaintiff in an action of slander, as the words were not actionable; and the nonsuit was set aside, on the ground that the objection appeared on the record, and should have been taken advantage of in arrest of judgment. It may be observed that was the case of a nonsuit; but it may well be doubted whether this case be an authority for a party who has himself joined in a requisition to the learned Judge to give a direction; what that direction should be is another question, and is open to him to argue, but to object to the form of the proceeding is scarcely so. The authority of the case itself may however well be doubted, when we refer to *Whitworth v. Hall* (a). That was an action for maliciously, and without probable cause, suing out a commission of bankruptcy against the plaintiff: Plea, not guilty. At the trial, plaintiff's Counsel having stated the case, defendant's Counsel objected that the action was not maintainable, because it was not averred, nor could it be proved, that the commission was superseded. The learned Judge thought the objection fatal, but refused to nonsuit the plaintiff, on the ground that the defendant ought to have demurred to the declaration. The following Term, a rule having been obtained for entering a nonsuit, cause was shown, and it was argued that the want of an averment that the commission was superseded was good ground for demurrer; and the defendant not having demurred, the learned Judge was right in refusing to nonsuit. But Parke, J., held, if the objection was fatal, the learned Judge ought to nonsuit, and the rule was made absolute. In this case the learned Judge did not nonsuit, for the plaintiff refused to submit to a nonsuit, and called for a direction, which had the same effect as a nonsuit, for which *Whitworth v. Hall* would have been an authority; and the learned Judge in this case had the authority of Lord Lyndhurst for the course he took. His Lordship received the evidence for the plaintiff, and heard the point argued, whether the defendant had the privilege of a

(a) 2 B. & A. 695.

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But a distinction has been taken between the case of *Dicas v. Lord Brougham* and the present case. The declaration, it is said, in *Dicas v. Lord Brougham*, was good, and it was only upon the evidence it appeared that the action was not sustainable; but that the declaration in this case is bad. It might be sufficient to say that *Whitworth v. Hall* was an answer to that observation. But is it because the plaintiff has put on the file a bad declaration, and the action appears also in evidence to be untenable, that the defendant is to be deprived of the benefit which he would have if there had been a good declaration?

It has also been said, that a Judge at Nisi Prius has only to try the issue in fact joined between the parties. But what was the issue here? It was whether the defendant was guilty or not guilty of a misfeasance. If the issue in fact becomes dependant upon an issue in law, does it not become the duty of a Judge to direct the jury as to the verdict they should find; with his opinion, that the act complained of could not sustain an action? Was he to leave it to the jury to find the defendant guilty on their oaths? Why put the defendant to the disadvantage of moving in arrest of judgment after a verdict, when the Judge is of opinion that there is no case for a verdict, and the plaintiff desires, as he has a right to do, to try the validity of that opinion by a bill of exceptions? and shall he be allowed, if the Court concur in that opinion, to try back merely for the purpose of saying the matter should be decided in another form? I confess this appears to me quite decisive against allowing this objection now to prevail, even were there an exception pointed to it, which I do not find there is.

But there yet remains a view of this case which entitles the defendant to hold his verdict; and that brings me to the consideration of the plaintiff's third exception, namely, that the Judge should have told the jury, if they believed the evidence on the part of the plaintiff, they ought to find a verdict for him. This supposes the

defendant to be responsible for a breach of duty, and I am willing so to take it. But I ask, what evidence is there beyond the mere refusal to receive the appeal, to show such a breach of duty as is charged by the declaration, "that the defendant, contriving and "wrongfully intending unjustly to injure and oppress the plaintiff, "and to prevent him from appealing, and not regarding his duty "as such Assistant-Barrister, or the statute in that case made and "provided, or the law of the land, absolutely refused to take said "appeal?" What is the evidence? That the Sessions commenced at Galway on Friday, the 3rd of November 1851; that the civil-bill business ended on Saturday, and the criminal business commenced on Monday. We have therefore the acting of the Assistant-Barrister as a Civil Judge terminating on Saturday. Now, I admit, for argument sake, that he went through the whole ceremony of preparing these documents; at the same time, he does not tell us any thing, whether the documents set out the nature or particulars of the service of the names of the securities; it is not alleged or proved that they were named, and a variety of other things are not shown. I will pass over that, and I will take for granted that he gave it to the Assistant-Barrister on Monday evening, after it appeared that the Crown book had been ruled, and the Crown business all finished, and that the whole of the civil-bills had been disposed of by twelve o'clock on Saturday, and that he had lodged his other appeals on the first Friday. Now, I will take every part of that as proved; I will take, in addition to it, by the evidence of attorneys of thirty years standing, that the Assistant-Barrister had been in the practice of receiving appeals after the civil business had ended. There was, however, no evidence whatever given (as in the case of *Dicas v. Lord Brougham*) of any rule of the Court, or any rule of law regulating the practice, to show that the Assistant-Barrister was bound to receive appeals under the circumstances in which this was tendered: as far as we have evidence, it was matter of pure discretion or courtesy on his part whether to receive them under the circumstances in which this appeal was tendered. Taking every tittle of evidence that was given with this consideration, that he was as an Assistant-Barrister sworn to act impartially

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and justly, and therefore entitled to the presumption that he would so act, what is there in the evidence in this case on which to leave it to the jury to say on their oaths that he acted wilfully and wrongfully, with the design and purpose of injuring the plaintiff—that such was the defendant's motive, that it was no mistake, no refusal for any justifiable reason? I say therefore, taking the case on the ground of this exception, there is no ground for quarrelling with the direction of the learned Judge.

I regret to say that this case goes out of our hands without a deliberate judgment upon the ruling of the learned Judge upon the main point of it; and the more so, because I believe that if judgment had been given on that point, and had not gone off on what is called the second point, that the judgment of the Court would have been very different from what it is. It may, however, have been occasioned by a desire to dispose of the case on any other ground than the privilege of Judges. But I confess for my own part, though feeling that delicacy, I trust, I think we should also give effect to another feeling, and that is, the feeling of upholding a privilege which is for the benefit of the administration of the law, at least as much as it is for the protection of the Judges. I am not squeamish on that subject. I do not hesitate to claim for them, and desire to sustain, a privilege and protection which had existed from the earliest annals of the law, which had been claimed and maintained by its brightest ornaments, and its wisest and most learned sages. I do not desire or feel it necessary to decline the privilege which had been upheld and asserted by Lord Coke, Lord Holt, Lord Mansfield, Lord Tenterden, Lord Lyndhurst, Lord Downes, Chief Justice Bushe, and, “though last not least,” last in dignity, but not least in weight and authority, the late revered and learned Serjeant Warren. I do not decline to uphold, with the utmost firmness, and maintain that high privilege, nor do I think it will redound to or advance the dignity or credit of Judges (including the Assistant-Barristers) to put them in this position, which, under the late Act of Parliament, they may be placed in, to descend from the Bench into the witness-box, and there (to use a vulgar phrase) to clear themselves from the imputation of perjury. I do not,

under such circumstances, desire to strip them of the presumption which the law makes in their favour, and to which I think they have shown themselves entitled through a long course of years, and of which I am sorry to think they should now be about to be stripped; not, I think, tending in any manner to improve the administration of the law, or advance the cause of justice. I hope, though the attain of jurors is gone by, it is not about to be renewed (in the shape of an action on the case) against the Judges; and I should grieve to think that that was to be the result of this judgment.

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However, there is one, a further, topic which at this moment occurs to me, which I had passed by, on which I think I ought to make an observation; it was the view pressed by my Brother GREENE in the able and learned judgment which he gave; it was this, that we now, as a Court of Error, have not only to rule the exceptions, but to give judgment on the whole record. In his view the *Trimleston case* is perfectly conclusive on that point. I think that we now, seeing there is a bad declaration, an unsustainable cause of action, ought not to grant a *venire de novo*, for no possible purpose but to have another trial, and a verdict found, the judgment on which must be arrested, according to what I collect to be the opinion of the majority of the Judges, if they had not felt it right to decide the case on the point of form.

However, according to the judgment of the majority of this Court, though on different grounds, the judgment of the Court of Queen's Bench must be reversed.

Judgment reversed.

NOTE.—An appeal having been lodged against this judgment, the record was accordingly removed to the House of Lords; but before further proceedings were taken, the plaintiff in error, Mr. Freeman, died, and the suit thereby abated. The death of a plaintiff in error, before errors assigned, is an abatement of the writ of error *ipso facto*; and any proceedings upon that writ of error would be a mere nullity. But if the plaintiff in error die after errors assigned, the writ does not abate (*Tidd's Pr.* p. 1163). There being neither verdict or judgment in this case, both having been set aside by the decision of the Court of Exchequer Chamber awarding a *venire de novo*, the cause stood in the same position as if the defendant had died after issue joined and before trial.

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M'AULEY, Executor of LEDWIDGE,

v.

DALTON.

(*Common Pleas.*)

May 25, 29.

Where the plaintiff, an executor, had after the decease of the testator made a parol letting to the defendant of a house and premises, part of the testator's assets; *Held*, that the action for use and occupation was properly brought by the plaintiff in his representative capacity.

ASSUMPSIT, by the plaintiff, as executor of one Simon Ledwidge, to recover the sum of £45 alleged to be due by the defendant to plaintiff, as such executor, for the use and occupation of certain premises situate in North King-street in the city of Dublin, for one year and a-half, ending the 1st day of January 1852. The defendant pleaded the general issue. The case was tried before Richards, B., on the 3rd of May 1852, in the Consolidated Nisi Prius Court. At the trial, the plaintiff, being examined in support of his own case, proved that Simon Ledwidge, who was the owner of the house, carried on business in it up to the time of his death, which occurred about twelve years previous to the trial. That the defendant was in his employment up to the time of his death, since which period the defendant continued in possession, and paid rent to the plaintiff for several years, at the rate of £30 a-year. That the plaintiff received the rent as executor of S. Ledwidge, and passed receipts to him for it from time to time, although, on the receipts being produced, the rent was not expressed to be received in that character. The plaintiff also proved that one and a-half year's rent was due at the time when the action was brought. On cross-examination he stated that he believed the defendant did not hold any portion of the premises prior to Ledwidge's death; but that the defendant, at the time he took the premises, was aware that the plaintiff was executor of Simon Ledwidge.

The plaintiff having closed his case, Counsel for the defendant called on the learned Judge to nonsuit the plaintiff, on the ground—first, that there was no evidence that the premises occupied by the

defendant were held by S. Ledwidge for a chattel term so as to pass to his executors; secondly, that admitting the interest of Ledwidge in the premises in question to be a chattel one, yet inasmuch as the contract was entered into by the plaintiff after the death of Ledwidge, the action should have been brought by the plaintiff in his individual, and not in his representative, capacity; and thirdly, that there was no evidence of the plaintiff being the personal representative of Ledwidge.

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The learned Judge declined to nonsuit the plaintiff, being of opinion that the receipt of rent by the executor of Ledwidge for so many years was evidence that the premises were held as chattel property by Ledwidge; and that there was also evidence to go to the jury that it was in his representative character the plaintiff had set the premises to the defendant; but reserved liberty to the defendant to move to have a nonsuit entered in case the Court should be of opinion that he should have adopted that course.

The defendant then went into evidence in support of another line of defence, which did not become material; and the jury ultimately found a verdict for the plaintiff for £30. A conditional order having been obtained by the defendant to enter a nonsuit pursuant to the leave reserved—

Macdonogh (with whom was *O'Driscoll*) now showed cause. He cited *Catherwood v. Chaband* (a); 1 *Chitty on Plead.*, 5th ed., pp. 22, 23.

W. Bourke and *Jordan*, in support of the conditional order.

The action should have been brought by the plaintiff in his individual, and not in his representative, capacity. The test by which to determine the question is, who would be entitled to the rent in the event of the death of the plaintiff, his own executor or the administrator *de bonis non* of Simon Ledwidge? The case of *Drue v. Baylye* (b) shows that under such circumstances it would pass to the plaintiff's executor. In that case an administrator, possessed of a term left by the testator, made an under-lease, reserving rent to

(a) 1 B. & C. 150.

(b) 1 Freeman, 392.

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himself, his executors, administrators and assigns; and it was held that upon his death his executor was entitled to the rent, and not the administrator *de bonis non* of the intestate; and Hale, C. J., says:—"The administrator hath a double capacity in him when he makes this lease—one in his own right, and another in right of the intestate, and although he hath this term wholly in right of the intestate, yet when he makes this lease, he hath power to dispose of the whole; and by making a lease of part, he doth appropriate that to himself, and divides it from the rent, and hath the rent in his own right." This case is cited and approved of in *Kelly v. Shaw* (a). The case of *Hosier v. Lord Arundell* (b) was also cited.

O'Driscoll, in reply.

The case of *Drue v. Baylye* is distinguishable. There the plaintiff had reserved part of the assets and appropriated them to himself. The same observation applies to the case of *Kelly v. Shaw*.

Cur. ad. vult.

May 29.

The judgment of the Court was now delivered by—
MONAHAN, C. J.

We are of opinion that there are no grounds for this application. At the time when the case of *Drue v. Baylye* was decided, the rule of law was supposed to be that, where a contract was entered into with an executor, in that case he should bring the action upon that contract in his own right, and not in his representative capacity. Accordingly, in several of the cases put by Lord Hale in his judgment in the case of *Drue v. Baylye*; for instance, the case in which the executor sells a horse the property of his testator. It was then supposed that the action for the recovery of the horse should be brought by the executor in his private capacity, and not as executor. But the rule of law has in latter times been altered in that respect; and there can be no doubt now that where an executor sells a portion of the assets of the testator, and brings an action for the price, he may bring that action either in his own right or in his representative capacity. The only question at present before us in this case is,

(a) 1 Ir. Com. Law Rep. 225.

(b) 3 B. & P. 11.

whether where the action is brought for the use and occupation of what was the chattel property of the testator, and vested in the executor as such, the executor is bound to bring the action in his individual character, or has the option of suing in his own right, or in his representative capacity, according as he may choose? The point decided in *Drue v. Baylye* (a) was, that where an administrator makes an under-lease of lands held for a term for years, left by the intestate, and expressly reserves the rent to himself, his executors, administrators and assigns, and there is nothing to show that he made the lease in his representative character, there he must sue in his individual capacity. That point was also decided in *Kelly v. Shaw* (b).

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But we think that these cases have no application to a parol letting by an executor, *qua* executor, not reserving rent to himself, his executors, administrators and assigns, but reserving the rent generally; because where the rent is reserved generally, it follows the nature of the reversion.

We do not think the rule in that case of *Drue v. Baylye* is to be extended to cases like the present, as it was conceded there that the reversion still constituted a portion of the testator's assets, and as such was vested in his personal representative—producing this anomaly, that the reversion was vested in one party, and the rent during the continuance of the under-lease in another.

The question here is, was the learned Judge right in allowing the case to go to the jury, or should he have nonsuited the plaintiff? And that depends upon this, namely, whether there was any evidence to go to the jury that the rent had been paid to the plaintiff in his representative capacity or not. We think the learned Judge was right in permitting the case to go to the jury, inasmuch as there was in our opinion evidence to go to them that the rent had been paid to the plaintiff as executor, and that therefore at his death it would not pass to his personal representative, but to the administrator *de bonis non* of the testator. The cause shown must therefore be allowed with costs.

Cause allowed, with costs.

(a) 1 Freeman, 392.
 VOL. 2.

(b) 1 Ir. Com. Law Rep. 225.
 69 L

E. T. 1852.
Common Pleas.

FORREST v. MAHER.

May 8.

A defendant having a country residence, but occupying lodgings in Dublin at the commencement of the action, is not resident at the latter place, within the meaning of the 14 & 15 Vic. c. 57.

O'DRISCOLL moved that the judgment by default, obtained in this cause by the plaintiff, might be rectified, by expunging therefrom the sum awarded for costs, on the ground that the cause of action arose in the city of Dublin, and that the plaintiff and defendant were at the commencement of the action both resident there, within the meaning of the 14 & 15 Vic. c. 57. The writ of summons, which was in debt, issued on the 30th of January 1852, indorsed for the sum of £12. 2s. 10d., and judgment was marked upon the 26th of February 1842, for that sum. The affidavit of the defendant, made to ground the motion, stated that the deponent, having made arrangements for his permanent residence in Dublin for some months, left his house at Tertulla on or about the 1st of October 1851, and took lodgings in Molesworth-street, at which place he continued to reside permanently until the 27th of December 1851, when he went back to Tertulla for a short period, but returned again to Dublin on the 21st of January 1852, and had since the last mentioned period continually resided in Dublin, at No. 34 Kildare-street, and was not absent from Dublin from the 21st of January up to the time of swearing his affidavit, with the exception of absence of a few days, not exceeding ten days, in London, and a few days at Tertulla; during the greater portion of which period the defendant's wife occupied his said lodgings, and his letters and parcels were regularly sent there. The affidavit also stated the deponent's belief that the plaintiff was aware of the fact of the defendant being resident in Dublin, inasmuch as the writ of summons was served upon the defendant at his lodgings in Kildare-street. The affidavit of the plaintiff's attorney stated, that he had heard and believed that while the defendant was lodging in Molesworth-street he occupied two rooms as furnished lodgings, and that his lodgings in Kildare-street consisted of only two or three fur-

nished apartments, which, from the information which the deponent had received, he believed were rented only during the defendant's occupation, and that the defendant had not always occupied the same apartments in the house, which was let out to different lodgers. The affidavits both of the plaintiff and his attorney stated, that at the time of the issuing of the writ they believed that the defendant was resident at Tertulla House. Several other facts, leading on the one hand to establish, and on the other to disprove, notice of the defendant's residence after the service of the writ, were stated in the affidavits at both sides, which it is not material to mention.

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Drury, for the plaintiff.

The defendant had not such a residence in Dublin as would entitle him to be sued as such, under the 14 & 15 *Vic.* c. 57. Admitting that a lodger may be a resident within the meaning of that statute, it is clear he must be a permanent lodger, and not merely a person who occupies lodgings for a temporary purpose. This construction has been given to the parallel section of the 9 & 10 *Vic.* c. 95, s. '128, the English County Courts Act, in *Macdougall v. Patterson* (a). In that case, Jervis, C. J., is reported to say:—
 “Each case must depend upon its particular circumstances; but
 “where a party has a permanent place of dwelling, we do not think
 “that he dwells, in the sense of that word as used in the statute, at
 “a place where he has lodgings for a temporary purpose only.”—
 [MONAHAN, C. J. The only question is, if the defendant occupied lodgings at the commencement of the action, he does not come within the meaning of the Act, even assuming that he was a mere temporary resident.]

O'Driscoll, in reply.

The Court is called upon virtually to overrule their own decision in the case of *Snow v. Irwin* (b), in which they decided that a person occupying lodgings was a resident within the meaning of the Civil-bill Act. The 66th and 67th sections show that it was in-

(a) 15 Jur. 1108.

(b) 2 Ir. Com. Law Rep. 378.

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tended to include them. If it was intended to have confined its operation to the case of permanent lodgers, it would have been so expressed.

MONAHAN, C. J.

We are of opinion that this motion must be refused. At the same time, we do not intend in any manner to question the propriety of our former decision in the case of *Snow v. Irwin*, in which we held that a lodger might be a resident within the terms of the statute. But by the very terms of the 65th section of the Civil-bill Act, no decree shall be made by any Assistant-Barrister, "unless it shall be "proved that the house or place of residence in which the defendant, "or in case of more than one defendant, in which one of the de- "fendants, shall at the time of such service have usually resided, or "that the office, warehouse, counting-house, shop, factory or place "of business of the defendant, or one of the defendants, is situate "within such division of the county where the said Court is held, at "which the said defendant, or the said defendants, shall be required "to appear." Therefore, at the commencement of the suit, the defendant must usually reside within the jurisdiction of the Assistant-Barrister's Court. Now in this case, the defendant at the commencement of the action had his usual residence in the county of Tipperary. He says he came to Dublin with the intention of permanently residing; but it appears that if he entertained that intention he did not carry it into effect, for after remaining in lodgings in Dublin for two months he returned to his country place, and again returned to Dublin and took lodgings in a different street. We are of opinion, therefore, that the defendant's lodgings in Molesworth-street were not his usual residence within the meaning of the statute; and that the Recorder or Assistant-Barrister would have no more jurisdiction to make a decree against him than he would against a gentleman who, having his residence in Galway, should stay at a hotel in Dublin for a night, on his way to London. This motion must therefore be refused, with costs.

Motion refused, with costs.

E. T. 1852.
Exchequer.

CAHILL v. VERNER.

(*Exchequer.*)

April 30.

CASE, against a Sheriff, for a false return. On the trial before the CHIEF BARON, it appeared that a writ of *ca. sa.* had issued against one John Gibson, on the 2nd of July 1850. It came to the defendant's hands on the 4th or 5th of the same month, and bore this indorsement:—"The defendant resides with his mother, near the town of Carrickmacross in the county of Monaghan." The Sheriff returned *non est inventus*. It further appeared, that at the time the Sheriff received the writ, the defendant in the execution was ill (almost in the last stage of consumption), and confined to the house or garden attached to it; that about the middle of July he was removed to Rosstrevor, in another county, for the benefit of his health; that he remained there until the end of August, when he returned to the neighbourhood of Carrickmacross, and died in a few days, during that time being confined to bed. It also appeared that he had embarked in a profession, but that the state of his health prevented him from prosecuting it; and there was no evidence that he was possessed of any property.

There was no evidence that the Sheriff had made any attempt to execute the writ.

The CHIEF BARON told the jury, that the questions for them were, whether the Sheriff had used reasonable diligence in endeavouring to execute the writ, and if not, the value of the custody to the plaintiff, supposing it had been executed? The jury found for the plaintiff the full amount marked on the writ. Counsel for the defendant, at the trial, also objected that the indorsement on the writ was insufficient, under the 43rd and 164th General Orders

In an action on the case, against a Sheriff, for a false return of *non est inventus*, the measure of damages is the actual value of the custody to the plaintiff, and it lies on the plaintiff to give some evidence from which the jury may calculate that value, independently of the amount in the writ.

Where the jury have found their verdict on a wrong principle, the Court will set it aside and direct a new trial.

The indorsement on the writ described the defendant in the execution as "residing with his mother near the town of Carrickmacross, in the county of Monaghan:"—*Held*—a sufficient description, inasmuch

as the Sheriff made no objection to it on receiving the writ, and showed by his return that he was in no doubt as to the person.

E. T. 1852. but the CHIEF BARON overruled this objection, reserving leave for
Exchequer. the defendant to move.

CAHILL

v.

VERNER.

Fitzgibbon on a former day obtained a conditional order to set aside the verdict, as being against law and the weight of evidence and inasmuch as there was no evidence to warrant the jury in finding a verdict for more than nominal damages.

J. D. Fitzgerald (with him *R. Armstrong*) now showed cause.

The proper questions were left to the jury, and they were the proper tribunal to decide them. The questions were entirely for them.

Fitzgibbon and *Shegog*, contra.

There was no evidence that the custody of the execution debtor would have been of any value to the plaintiff, nor that the defendant had any property whatsoever: *Wiley v. Birch* (a); *Bales v. Wingfield* (b); *Clifton v. Hooper* (c); *Williams v. Mostyn* (d). In an action on the case (unlike an action of debt for an escape), the plaintiff is bound to show the actual damage he sustained: *Sedgwick on Damages*, p. 530, and the cases there cited.

But further, the facts show no default in the Sheriff, and therefore there ought to have been a verdict for him. If not, the verdict should have been for nominal damages, because there was no loss to the plaintiff proved, on the defective indorsement of the writ: *Kenwick v. Manning* (e).

Armstrong, in reply.

Prima facie, the amount of the writ is the measure of damages, and it lies on the opposite party to displace it. The plea and evidence thereon in *Wiley v. Birch* showed that no loss could possibly have been sustained by the plaintiff. The *onus probandi* was on the Sheriff; and the jury, having all the evidence before them, were justified in finding as they did.

(a) 4 Q. B. 566.

(c) 6 Q. B. 580.

(b) 4 Q. B. 580.

(d) 4 M. & W. 145.

(e) 1 Dow. P. C. 59.

PIGOT, C. B.

We think the verdict in this case ought not to stand. We do not approve of the verdict; but we should not set it aside on that ground alone; for if the jury formed their opinion on right principles, they were the proper judges. But I think they took a mistaken view of the principle on which they acted in this case. I left it to them to say what the custody was worth. It is clear upon the evidence that it was not worth the sum marked on the writ. The circumstances of the case were peculiar—[states them.] The defendant in the execution was not proved to have possessed any property, and there were no elements in the evidence to lead to the conclusion that his custody would be worth the amount in the writ. We think therefore the jury were wrong in the principle they applied to ascertain the damages, viz., the amount marked on the writ. We do not say that the jury should have had evidence in money numbered of the value of the custody; they might derive it from a consideration of the circumstances of the party. We shall not direct a verdict for nominal damages to be entered except by consent, but unless there be such consent we shall set aside the verdict and direct a new trial.

With respect to the question of the insufficiency of description on the writ, we do not yield to that objection. The Sheriff, after receiving the writ, sought for no more specific information, and left the plaintiff under the impression that the party was known to him, and by his return he shows that he knew the person intended. We must therefore hold the description substantially sufficient.

GREENE, B., concurred.

E. T. 1852.

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CAHILL

v.

VERNER.

E. T. 1852.

Exchequer.

ELIZABETH HELEN CROKER, Executrix of
JOHN CROKER, deceased, v. JAMES WALSH.

May 1.

Assumpsit, on
an account
stated and
settled.

Held, an
I O U not
sufficient evi-
dence to sus-
tain the count,
where it ap-
pears it was
extorted from
the defendant,
or given under
circumstances
that negative
the admission
of a debt.

THIS was an action of assumpsit, brought by the plaintiff, as executrix of John Croker, deceased, for recovery of the amount of two I O Us, for £12. 10s. 9d., and £5. 6s. 11d., respectively, and bearing date the 30th day of August 1850. These I O Us were respectively passed to the plaintiff by the defendant for rent, which accrued due out of the lands of Firmorent, in the county of Kildare, during the lifetime of the late John Croker, up to the 31st of July 1850.

The declaration contained the common money counts, and the count on an account stated with the plaintiff as executrix.

The defendant pleaded the general issue, and served notice of set-off for a sum due from the said John Croker in his lifetime, and by the said plaintiff as executrix, for board and lodging, maintenance and residence, of Mr. Thomas Cooke, the agent, steward and manager of the said John Croker during his lifetime, from the 19th day of November 1848 to the 20th day of May 1849, and for cash given, and goods sold and delivered by the said defendant to the said Thomas Cooke, and to his orders as such agent, steward and manager for the said John Croker, deceased, from the 15th day of March 1849 to the 25th day of January 1850.

The action was tried before the LORD CHIEF BARON and a common jury, during the after-sittings of Michaelmas Term 1851. The facts of the case were as follow, viz.:—Mr. William Molony, who had acted as agent for Mr. Croker during his lifetime, and for the plaintiff since his death, proved that it had been the custom of the estate to allow Thomas Cooke, the steward to said lands, to pay the labourers their wages by written orders on the defendant, which orders when produced were allowed as cash to the defendant in the settlement of his rent, but that Cooke had no further authority. The

defendant had borrowed a sum of money from the said Molony, and for the purpose of securing the repayment of it had deposited with him a lease, which Molony refused to give up until the defendant would sign the said two I O Us for the rent due to the plaintiff as executrix of Croker, although the money lent to the defendant had been repaid. The defendant did accordingly sign the I O Us, and the lease was delivered to him. The defendant on that occasion also claimed to be entitled to set off his demand against the demand for rent, and which exceeded it in amount. It appeared that the defendant had furnished three accounts to Cooke, in which he claimed the subject-matter of the set-off as a personal claim against him, and not against Croker. It also appeared that an account had been furnished by the defendant to Croker, and settled in his lifetime, of a later date than the date of the last item comprising the set-off, in which account none of the items of set-off were claimed as a credit against Croker. It was admitted by the defendant that the rent was due by him at the time he passed the I O Us.

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 CROKER
 v.
 WALSH.

The LORD CHIEF BARON, in charging the jury, left to their consideration two questions :—

First—Whether the subject-matter of the set-off was the debt of the said John Croker, or the personal debt of the said Thomas Cooke? and directed them to find for the defendant, should they be of opinion that the credit was given to Croker.

Second—Whether at the time the I O Us were signed by the defendant, coercion was resorted to by the plaintiff's agent, Mr. Molony, by the detention of the said lease of the defendant?—and if they should be of opinion that such coercion was resorted to, his Lordship informed them that in law it amounted to duress, and vitiated the I O Us, and accordingly that they should find for the defendant.

The jury found for the defendant; and on being asked by the learned Judge on what grounds they had done so, stated it was because they believed the I O Us had been signed under the threat of retaining the lease; but they further stated that they were of opinion that the set-off was a debt due by said Thomas Cooke, and not by the said John Croker, to said defendant.

E. T. 1852.
Exchequer.
 CROKER
 v.
 WALSH.

On the 13th of January 1852, a conditional order was obtained by the plaintiff—"That the verdict had for the defendant at the "Nisi Prius Sittings after last Michaelmas Term be set aside, "and instead thereof a verdict be entered for the plaintiff for the "amount of his demand, pursuant to the leave reserved by the "learned Judge at the trial, on the ground of the misdirection of "the learned Judge; or that said verdict be set aside and a new "trial be had, on the ground of the said verdict being against law "and evidence, and against the weight of evidence, unless cause," &c.

Levy, with *G. Fitzgibbon*, now showed cause on behalf of the defendant.

There is no count for the rent: the plaintiff must therefore recover on the account stated and settled, or not at all: *Fesenmayer v. Adcock* (a). Parke, B., there said:—"An I O U is no more proof "of money lent by the party holding it to the party sought to be "charged by it, than of goods sold and delivered by one to the "other; and unless it is evidence of an account having been stated "between them, it proves nothing at all." *Curtis v. Richards* (b); *Douglas v. Holmes* (c). I O Us are merely evidence of the admission of a debt, but admissions made on compulsion are not evidence of an account stated: *Tucker and another, assignees of Hickman a bankrupt, v. Barrow* (d); *Lubbock v. Tribe* (e). *Rolle's Abr.*, p. 687, tit. *Dures d'Imprisonment*. Money extorted by duress of goods may be recovered in an action for money had and received. In *Wakefield v. Newbon* (f), Lord Denman, in his judgment, said:—"It may produce circuitry of action; but the evil of allowing extortion by means of a wrongful detention of goods would be much "greater, and the wrongdoer has no right to complain when he is "compelled to restore money which he was warned that he had no "right to extort."

Macdonogh, with him *W. C. King*, in support of the order.

If there were a sum of money due to a person who refused to de-

(a) 16 M. & W. 449.

(b) 1 M. & G. 46; S. C. 1 Sc. New Rep. 155.

(c) 12 Ad. & El. 641.

(d) 7 B. & C. 623.

(e) 3 M. & W. 607.

(f) 6 Q. B. 240.

liver up deeds until paid, and the debtor pay in consequence, he cannot recover the money back: *Chit. on Contr.* p. 192; 2 *Inst.* p. 482; *Bac. Abr.*, tit. *Duress*, A. The principle laid down in the books referred to, and in the older authorities, is that inability to refuse must exist, or such circumstances that a firm and prudent man would not resist. It must be duress of person, not of goods: *Skeate v. Beale* (a). Lord Denman there said:—"But the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert."—[PIGOT, C. B. If an I O U were a contract, this case would fall within those authorities which decide that a duress of goods does not invalidate a contract; but an I O U is only evidence of an account stated—an admission of a debt, but made here under such circumstances as to rebut its effect.—GREENE, B. The proposition is, can an admission made under the circumstances be regarded as an admission?]
An admission cannot be invalidated by any circumstances of duress. Three propositions, at all events, are necessary to be maintained in cases of this kind; first, liability of extortioner to discharge some duty, as here to give up the deed; secondly, some urgent occasion for the thing retained; thirdly, the debt not rightfully due: *Wakefield v. Newbon* (b).

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Counsel for the plaintiff resumed.

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The question is, was there such duress as to preclude the I O U from being evidence on an account stated?—[PENNEFATHER, B. The question appears to me to be this:—where an I O U was given by the defendant, accompanied by the protestation that he had a cross-demand, which left no rent due, whether, leaving duress out of consideration altogether, such an admission would be evidence of an account stated?]
Leaving duress out of the question, there is an admission of the debt, good to support the account stated. Where there are several transactions between parties, an account may be stated on foot of any one of them: *Chit. on Contr.*, 4th ed., p. 562, and cases there referred to, as to duress vitiating a contract.

(a) 3 P. & D. 597.

(b) 6 Q. B. 276.

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The cases referred to, where money paid under certain circumstances has been recovered back, are distinguishable in this respect, the debt was not due. Duress has no effect where the debt is due: *Atlee and others v. Backhouse* (a). Lord Abinger there said, that on an examination of all the cases, it would be found that they were cases of this nature:—"Where property has been unlawfully seized or unlawfully detained, for the purpose of enforcing the payment of money that was not due. In all those cases (and there is a great series of them) the party against whom the goods have been unlawfully seized or detained is entitled, after payment of the money, to bring an action for money had and received, to try the right."

Fitzgibbon, in reply.

In considering the effect of the I O Us in evidence, the object for which they were given must not be lost sight of. They were given in order to procure the possession of a lease. To hold that under the circumstances they admitted the debt, would be to give them an effect different from that intended by the party who signed them. They were given *alio intuitu*; the case must be decided on that ground, without involving at all the question of duress.

PIGOT, C. B.

We are all of opinion that the cause shown must be allowed. It is conceded that the plaintiff must recover on the count on an account stated, or not at all; it is therefore unnecessary to consider what would be the effect of the evidence if the declaration had been different. The question lies within very narrow limits, and it is simply whether these I O Us, given for a claim for rent admitted to be due, are, under the circumstances, conclusive evidence of an account stated? That they are *primâ facie* evidence of an account stated and settled, is perfectly clear—that the demand on foot of which they were passed still existed, and that they were regularly signed by the defendant, were conceded facts in the case; and in the absence of any proof on the part of defendant, the plaintiff's demand would have been fully sustained. It is unnecessary for us to say what would have been the effect of these I O Us if there had

(a) 3 M. & W. 633.

been a count for rent in the declaration ; but if it were necessary, I should have no hesitation in saying, that they would clearly import an admission of a liability on the part of the defendant to the amount of rent claimed by the plaintiff. They would be evidence that so much rent was due to a certain period, and that a tenancy existed ; for it appears on the face of the documents themselves that they were passed for the rent due by the defendant out of certain lands, and up to a certain time. I make these observations, as I think it very important to guard against the idea that the authority of that class of cases which decide that vouchers, I O Us, and documents of that nature, close a case between the parties to them, is intended to be even in the slightest degree questioned by our present judgment. This is a peculiar case—and the question now before the Court is, not the amount of rent appearing due upon the evidence, but whether there exists a debt, the amount of which was settled upon the statement of an account between the parties on foot of this or any other transaction ? Now, has there been an account stated and settled between the parties to this action ? and did the defendant admit that he owed the amount ? The rule of law is quite settled, that the consideration of a simple contract debt sought to be recovered in an action on an account stated may be inquired into, so as to enable the party to show the circumstances under which that contract was created ; and although a party will not be permitted to unravel the several accounts, the settlement of which is the ground of the action, yet he will be permitted to prove that, although *prima facie* such a transaction was evidence of the existence of a debt, still in point of fact no debt existed. It may also be open to the party charged to show that that account which is *prima facie* evidence of his liability was stated in reference to what in reality did not constitute a debt, and that it was obtained under such circumstances as to destroy its effect. If a party claim an arrear as due and owing to him on foot of some demand, it is open to the party charged to show that no debt in reality is due, and therefore no arrear. The principle is the same in this case. Again, the debt might be due by a third person, and on that circumstance being established, the case would fail. The plaintiff in the present case seeks to recover a sum of money undoubtedly due ; but he has rested his claim solely

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upon the count on an account stated, and if he fail to adduce evidence adequate to sustain that count, he cannot recover. The consideration in this case is not questioned; but the defence is, that the I O Us in question—which are the only evidence to sustain the count on an account stated—do not disclose what the real nature of the transaction between the parties was: the question then for the consideration of the Court reduces itself to this point—whether these I O Us are a voluntary admission of a debt due by the defendant, or whether they were given *alio intuitu*? We are of opinion that the evidence given is sufficient to establish the fact that they were not given voluntarily, and, if not, there was no admission of an existing debt. The documents in question, then, coupled with the circumstances under which they were given, do not afford evidence of a voluntary admission. Let us refer to the evidence, to see how the case stands as regards this alleged admission. One of the documents relied upon to create this liability is as follows:—

“ Dublin, July 30, 1850.

“ I O U the sum of twelve pounds, ten shillings and nine pence
“ sterling, being the amount of rent due by me out of the lands of
“ Firmorent, to the late John Croker, Esq., up to the 13th of July
“ 1850.

“ JAMES WALSH.

“ To Mrs. Helen Croker.”

The other document was for £5. 6s. 11d., and was drawn in the same way, and signed by the defendant. When those documents were presented to the defendant he refused to sign them, on the ground that he had cross demands against the plaintiff for a larger amount; and although the finding negatived that cross demand, still it can hardly be contended that the defendant, under the circumstances, admitted a balance, when in fact he denied there was any debt. The nature of the transaction was this:—The defendant says, “ I admit
“ I owe you a certain sum for rent, but you owe me a greater sum;
“ the balance is due to me.” That cannot be held to establish the fact that the defendant owed a specific sum as a debt, and so sustain the count on an account stated. The claim made by the defendant at the time, and which was not adjusted when the I O Us were given, negatives the import of the admission. The plaintiff’s agent takes the I O Us, but says, “ I reject the document containing your cross

demand." The inference to be drawn is, that although the defendant allowed him to keep the documents as evidence of a liability to that amount, he nevertheless reserved his claim, which, if well founded, would leave the plaintiff his debtor.

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As to the other point in this case, that the documents were given not as an admission, but for another purpose, is admitted by Molony, and proved by the defendant. It is admitted that when the defendant asked for his lease, Molony refused to surrender it until he signed the I O Us in question. The I O Us were then given in order to get possession of the lease. These circumstances negative the fact of any settlement of accounts between the parties, or the presumption that the defendant admitted a specific sum to be due by him. In every case of accounting it is necessary, *ex vi termini*, that a specific amount should be ascertained as the debt; and it has been held that where a single debt existed, a clear admission of that debt amounted to evidence of an account stated between the parties. But in the present case there were clearly cross demands between the parties; and it is also clear that they had not been finally adjusted. In leaving the case to the jury, I told them that if they were of opinion there was not a voluntary admission of a debt on the part of the defendant, but that he gave them for the purpose of getting up his lease, they did not amount to an account stated. The jury found accordingly that there was no admission of the debt, on the ground that the I O Us were extorted from him. And although the jury also found that the cross demand made by the defendant was unfounded, as the goods procured by Cooke were for himself, and not for the plaintiff, still the plaintiff's case, that there was an account stated, was unsustained, and accordingly the jury found for the defendant. That the jury were properly directed, all the Court agree, and also that every portion of the application is wholly untenable. In deciding this case we are not to be understood, as I have already intimated, as placing any bar in the way of the plaintiff from bringing her action to recover the amount of rent admitted to be due, if she may be so advised.

PENNEFATHER, B., and GREENE, B., concurred.

Allow the cause shown, with costs.

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A claimant had his qualification on the list of voters for a borough, for "a house 11 George's-lane, and a house 55 Joy-street;" and it appeared he occupied in immediate succession the two houses for more than twelve months prior to the 20th of July 1852, and that he still continued to occupy the house in Joy-street, and had paid all poor-rates due out of the premises; but in the last rate for the time being, June 1852, the Joy-street house was rated in

THIS was an appeal from the decision of the Assistant-Barrister of the county of Antrim, made at the last Registry Sessions, and the following facts appeared on the statement of the Barrister:—

The respondent, Patrick Reilly, of Joy-street, Belfast, had his qualification on the list, as for a house 11 George's-lane, and a house 55 Joy-street. It appeared that Reilly occupied in immediate succession the two houses above specified, for more than twelve months prior to the 20th of July 1852, and that he still continued to occupy the house 55 Joy-street, and had paid all the poor-rates due and payable out of the said several premises. At the time of the last rate, in June 1852, for the time being, the rating of the Joy-street premises was in the name of a person called Charles Swann, of the net annual value of £12; and in the September rate of 1851, the rating of the George's-lane premises was in the name of Edward Gray, of the net annual value of £14. It further appeared that on the 4th of August 1852, a claim was served by Patrick Reilly the respondent, on the Guardians of the Poor, to rate him by name in respect of a house 55 Joy-street. At the

the name of another person than the claimant, at the net annual value of £12; and in the previous rate (September 1851) the rating of the George's-lane premises was also in the name of another person, at a net annual value of £14. On the 4th of August 1852, the claimant served notice on the Guardians of the Poor to rate him by name in respect of the Joy-street premises.—*Held*, that it was not necessary for the claimant, relying on a successive occupation, to have included in the claim the two sets of premises.

Held also, that the claim made on the 4th of August was made in proper time, inasmuch as the claimant was qualified by relation on the 20th of July, all his rates being then paid.

* MONAHAN, C. J.; PIGOT, C. B.; PENNEFATHER, B.; TORRENS, J.; JACKSON, J.; BALL, J., and GREENE, B., presiding.

revision before the Barrister, it was objected, firstly, that the claim should have embraced the George's-lane premises; and secondly, that the claim was not served in time. The Barrister overruled both objections, and retained the name on the list.

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Macdonogh and *Meade* appeared on behalf of the appellant. The Senior Counsel was about proceeding to state the appeal, when—

Carleton (*amicus Curiae*) intimated that it was the privilege of Junior Counsel to open the case.

Hutton, who appeared for the respondent, stated that in England only one Counsel was heard on Registry Appeals, and it would be a hardship to impose on a client the necessity of employing two Counsel.

Carleton.—The practice adopted in England is founded on the practice before the Privy Council; but the hearing of Registry Appeals in Ireland is grounded on the practice of the Exchequer Chamber, where the Junior invariably opens the proceedings. He referred to 13 & 14 *Vic.*, c. 69, s. 74.

MONAHAN, C. J.

If there be two Counsel engaged, the Junior should go on; but as no rule has been established as to the practice in hearing Registry Appeals, we will not consider it essential that two Counsel should be employed. Doubtless, if the Exchequer Chamber practice be followed, the Junior has the right: unless he waive that right he is entitled to proceed.

Meade accordingly went on.—The objections here made are two-fold—first, that Reilly, claiming as successive occupier of two sets of premises, was not properly rated; and secondly, that he was not virtually rated in respect of the premises successively occupied. The first question turns upon the 13 & 14 *Vic.*, c. 69, ss. 5 & 7.* The first

* 13 & 14 *Vic.*, c. 69, s. 5:—"And be it enacted, that in addition to those now qualified by law to register and vote at any election of a member or members to serve in Parliament for any city, town or borough in Ireland, in virtue of any qualification not requiring occupation, every male person of full age, and not subject to

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set of premises occupied by Reilly was in George's-lane ; for these he is not rated at all, and yet he claims as successive occupier. The words in the 5th section, "such occupier," do not refer to the premises, but to the occupier, and Reilly should have been in possession

any legal incapacity, who shall occupy, as tenant or owner, within any city, town or borough in Ireland, returning a member or members to serve in Parliament, any lands, tenements or hereditaments, and shall be rated under the last rate for the time being, under an Act of the 1st and 2nd years of the reign of her present Majesty, intituled 'An Act for the more effectual relief of the destitute poor in Ireland,' or any Act or Acts amending the same, as occupier of such respective lands, tenements or hereditaments, at a net annual value of £8 or upwards, shall, if duly registered according to the provisions hereinafter contained, be entitled to vote at any election of a member or members to serve in Parliament for the city, town or borough within which such respective premises shall be situated; provided that no such person shall be so registered in any year unless he shall have been such occupier for the space of twelve calendar months next before the 9th day of November 1850 (as regards the register for the year 1851), or next before (in any succeeding year) the 20th day of July in such year, and shall on or before the 30th day of September 1850 (as regards the register for the year 1851), and shall (in any succeeding year) on or before the 1st day of July in such year, have paid all poor-rates in respect of such respective premises which shall have become payable from him in respect of such premises previously to the 31st day of March 1850 (as regards the register for the year 1851), and previously (in any succeeding year) to the 1st day of January in such year."

Section 7.—"And be it enacted, that the premises in respect of the occupation of which any person shall be entitled to be registered in any year, and to vote in the election for any city, town or borough as aforesaid, shall not be required to be the same premises, but may be different premises occupied in immediate succession by such person during the twelve calendar months next previous to the 9th day of November 1850 (as regards the register for the year 1851), or next previous (in any succeeding year) to the 20th day of July in such year, such person having paid on or before the 30th day of September 1850 (as regards the register for the year 1851), or (in any succeeding year) on or before the 1st day of July in such year, all the poor-rates which shall previously to the 31st day of March 1850 (as regards the register for the year 1851), and previously (in any succeeding year) to the 1st day of January in such year, have become payable from him in respect of all such premises so occupied by him in succession."

Section 110—Provides, that a person "whose name shall have been omitted from such rate," may "present to the Guardians of the Union a claim to be rated in respect of such premises, and such claim shall be in writing, and signed with his name; and upon such occupier so claiming, and actually paying or tendering the full amount of the rate or rates (if any) then due in respect of such premises, the Guardians of the Union shall insert the name of such occupier in such rate in respect of such premises as aforesaid; and in case such Guardians shall neglect or refuse so to do, such occupier shall, for the purposes of this Act, be deemed to have been rated in respect of such premises in the rate in respect of which he shall have claimed to be rated as aforesaid."

of the first set of premises at the time the rate was made on him, to entitle him to claim. Some one else may have been in the occupation of them. The words, "poor-rates payable from him," are in that section, and the poor-rate being only on the person liable, these words intimate that the claimant is the party to be rated. In the 7th section the condition is that the rates shall have been discharged in respect of all the premises in the claimant's occupation.

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Previous to the 20th of July, the Town-clerk is to return the list of persons rated; that then is the day on which the title of the claimant arises. But suppose a rate struck after the 20th of July, if the words "such occupier" do not mean "such rated occupier," it would be impossible for a party to have been in occupation for twelve months, and the machinery of the Act would not then apply. The 20th of July is imported by inference from the latter sections of the Act of Parliament; but the plain meaning is, that a claimant, in order to be registered, must be such rated occupier as qualifies on the 20th of July.—[MONAHAN, C. J. He may be the occupier of such rated premises for twelve months, and may have been rated as such; if the premises were not rated, there is no other mode given by the Act of ascertaining their value.]

Then, as to the second point, that the claimant was not virtually rated in respect of the premises successively occupied by him, this depends on the 110th section of 13 & 14 Vic. The claim to be rated was only made on the 4th of August; this was too late, for his title should have been complete on the 20th of July. The 5th section requires twelve months' residence prior to the 20th of July, to entitle him to register; and the 33rd section enacts that on or before the 20th of July in every year the Town-clerk of every borough is to make out an alphabetical list of persons entitled to vote in the election of members, which list is to be in a form in the schedule to the Act; so that no person is entitled to be registered unless he be in the position there described, qualified to be rated on the 20th of July, or that he be actually rated.

The 34th, 36th, 53rd and 55th sections are also important.—[PENNEFATHER, B. Here the claim is made on the 4th of August; you say he cannot be registered as entitled on the 20th of July; but

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how is a claimant to know whether or not he be entitled prior to the 20th of July?—MONAHAN, C. J. When was the rate in fact made?—On the 16th of June; and the claimant must contend it has a retrospective operation, his claim to be rated. That 110th section creates a virtual rating, which arises on the contingency of the Poor-law Guardians omitting to put a party's name on the list; and to entitle a claimant to rely on that, he must claim on or before the 4th of August.—[PENNEFATHER, B. The omission was of the Guardians, which must be set right in due time.]—It was the omission of the claimant, who was rated for neither set of premises, not claiming to be rated before August. The virtual rating is only given in case of neglect of the Guardians.—[PIGOT, C. B. The Act gives that substituted right in express terms; but how are persons to know when they are rated?—MONAHAN, C. J. If the Guardians served the rate on the Town-clerk on the 20th of July, and the claim were made on the 21st of July, you say it would be too late; then you must go back to the 8th of July, the day on which the statute prescribes that the list is to be handed to the Town-clerk, and the time at which the law imposes a duty on the Guardians to return the list; then it must be taken the list is properly made out; if then afterwards a claimant omitted from the list make out his claim, would not the Guardians be bound to admit it?—Any claim subsequent to the 20th of July is void; but assuming that it would be sufficient, as far as the Guardians are concerned, the 4th of August is clearly too late, because that is the limit prescribed for making the claim on the Town-clerk.—[MONAHAN, C. J. Unless he make the claim before the list go out of the Guardians' possession.—PENNEFATHER, B. The Guardians made the rate in June; on the 8th of July the clerk of the union is to return to the Town-clerk the list of rated occupiers; then a duty is imposed on the Town-clerk of making out a list on or before the 20th of July; and if an objection be made to the list returned by the clerk of the union, you argue that should have been made before the 20th of July.—MONAHAN, C. J. Is there any provision enabling the Town-clerk to put a person on the list that is omitted from it? if not, he must publish the list as he receives it, and this though a rating or a

claim be made in the meantime.]—The Town-clerk is authorised to examine the rate-books, and that impliedly gives him authority to deal with the list. The claim and payment of rate is cotemporaneous, and the rate must be paid on or before the 1st of July.—[PIGOT, C. B. He must have paid on the 1st of July all rates due on the 1st of January; but if he be not on the rate-book when he seeks to be rated, he must, in addition, pay all the rates then due, to vouch for the substantiality of his application, and that would include a rate made subsequently.]

By the 34th section it is provided that on or before the 4th of August the claim must be given to the Town-clerk, so that then at least the title of the claimant must be perfect.—[PIGOT, C. B. That means that on that day he must make his claim as having been entitled on the 20th of July; and so by the 110th section he is to be registered if so entitled; and the Guardians have omitted him from the list; he must then be deemed to have been entitled on the 20th of July.—GREENE, B. The 53rd section enacts that the Barrister shall insert in any list of voters the name of every person omitted, who shall be proved to the satisfaction of the Barrister to have given due notice of his claim to be inserted in such list, and to have been entitled on the 20th of July to have his name therein inserted. Was that due notice the notice prescribed by the 34th section? If then, on or before the 4th of August, the notice be given to the Town-clerk, it is enough, and the claimant's title must be perfect at that time, or deemed to be so.]

Hutton, for the respondent.

This argument, as to the notice requiring to comprise both sets of premises, assumes the necessity of a double rating; and under 13 & 14 Vic. c. 69, a double rating is not necessary, and in this respect differs from the Reform Act. The 27th section of the English Reform Act (2 W. 4, c. 45) uses the words—“Nor unless
“such person, where such premises are situate, in any parish or
“township in which there shall be a rate for the relief of the poor,
“shall have been rated in respect of such premises to all rates for
“the relief of the poor in such parish or township made during the

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“time of such his occupation so required as aforesaid; nor unless such person shall have paid on or before the 20th day of July in such year all the poor-rates and assessed taxes which shall have become payable from him in respect of such premises previous to the 6th day of April then next preceding,” &c. In the case of successive occupations in England, the claimant required to be inserted in every rate made during the twelve months past; but in the 5th section of 13 & 14 Vic. c. 69, it is expressly omitted, the clause as to rating; and the only requisite is, that the claimant shall be rated under the last rate. The argument for the appellant would require a rating in respect of both sets of premises; this could not be done, because the successor of the claimant in the first set of premises would be the person rated by the Guardians; and to hold such a position good, would be but disqualifying successive occupiers. The rating of the statute is confined to the last rating, and all that is requisite is, that the claimant have been in occupation of premises of adequate value. It is apparent from the schedules to the Act that the last rate is the one contemplated.

As to the second objection, the object of that 110th section was to have the rate amended from its date; this the Guardians are bound to do; and the claimant is entitled to all the advantages derivable from it. He has up to the time of serving his notice on the Town-clerk to make his claim; but further, he has up to the time of the sitting of the Revision Court.—[BALL, J. If so, what is the necessity of the 110th section?]—He cannot serve his notice on the Town-clerk after the 4th of August; but he can call on the Guardians to produce the amended rate in the Revision Court. When the statute does not limit the time, the fair intendment of it is to be considered. The 110th section is analogous to the 30th section of 2 W. 4, c. 45 (English Reform Act), and the words there, “from the period at which the rate shall have been made in respect of which he shall have so claimed to be rated as aforesaid,” show that the Act had a retrospective operation. So too in 3 & 4 Vic. c. 108, s. 33 (Municipal Act), the words are *in pari materia*. If the claimant be in the last rate, he must be deemed to be in it from the time it was made; in the present case that was

in June 1852. The latter part of the 33rd section and the 34th section, as also the 35th section, are important. That last section empowers persons to inspect the rate-books from the 29th of July to the 2nd of August, and the words used are "of claims made or intended to be made."—[MONAHAN, C. J. That is to prevent the Guardians being troubled by every one applying, and has reference to claims made, or objections intended to be made.]—But up to the 20th of August we have a right to inspect the rate-books; and here we had no knowledge of our claim being omitted until the 27th of July.—[MONAHAN, C. J. Where the Barrister does not find the claimant on the Town-clerk's list, he inquires if he have served due notice; and if so, then the rate-book is produced, and the rate amended; and the Barrister has no jurisdiction to inquire when the rate was made; but if the Guardians have not altered the rate-book, then the 110th section makes a claim equivalent; and if the claim and rating be made the day before the Barrister opens his Court, the refusal of the Guardians cannot prevent the claim being made.]—The claimant must have been an occupier when the rate was struck, either expressly or virtually, to enable him to acquire the franchise.—[JACKSON, J. He must have been on the rate, or have done that which entitles him to be there.]—Then if the statute prescribe no limit for correcting the mistake of the Guardians in omitting him from the rate, the Court will not prescribe a limit.

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Macdonogh, in reply.

The second objection is fatal, for there is a limit prescribed by the statute, and a record is to be prepared by the machinery of the statute for the Barrister, and the terminus of the inquiry is the 20th of July. All the rights of claimants are limited by that period: ss. 30, 31, 32, 33, 34 & 35; the right of inspection of the rate is limited to the 20th of August, and by s. 36, an issue must be knit, as applicable to the state of facts, on the 20th of July, "who shall claim as having been entitled on the 20th of July." The objection here is, that the title was not consummate on the 20th of July. The 55th section indicates a boundary to which the jurisdiction of the Court and the machinery of the Act apply.—[GREENE, B. The Barrister is to decide whether the claimant was

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entitled on the 20th of July.—MONAHAN, C. J. Is there aught in the statute giving the objector a right to inspect any thing but the rate-book?—The Clerk of the Peace publishes a list of persons claiming to be rated as occupiers; and if there be any names of claimants not on the rate-book, they are known as those who claim by virtual occupation: so that means of information are thus supplied. It must be presumed the public officer did his duty, and placed the name on the list.—[MONAHAN, C. J. Were it not for the 110th section, no person could claim unless he was nominated in the rate-book, but he cannot be rated unless he be an occupier, and if he have been rated on or before the 20th of July, he is entitled to vote. What is the meaning of the 110th section? Can a man be rated for any premises except on the day the rate is made? How is he to get the rate altered? By getting his name inserted instead of the previous occupier, and when that is done, is it not to be considered as done on the day the rate is made? Without regard to registry, whenever the claim is made on the Guardians, they are bound to insert the claimant's name if he be the occupier, and make the rate-book what it ought to have been on the day the rate was struck.—GREENE, B. Would not the insertion of the name by the Guardians be an adjudication that the claimant should have been originally on the rate? and would he not thus be, on the 20th of July, a person entitled?—MONAHAN, C. J. When he is on the rate, it is as if from the day the rate was struck, and that rate was before the 20th of July.—PIGOT, C. B. Does giving notice constitute any part of the claimant's title?—We say the title must be consummate on the 20th of July—and was the claimant on that day a rated occupier in fact or in law?—[PENNEFATHER, B. Not in law, unless he paid his taxes and rates on the 20th of July.]—According to the argument on the other side, he need not have paid a rate struck in June until the 3rd of August; and the man whose name was not on the rate-book would be in a better position than the man whose name was, for he could be sued for the rate. The title of the claimant ought to be complete on the precise day on which the judicial tribunal is to deal with it, and the rating and occupation should be co-extensive.

Cur. ad. vult.

MONAHAN, C. J., delivered judgment.—[His Lordship, having inquired if Reilly were a mere claimant, and being answered in the affirmative, proceeded to read the statement of the Assistant-Barrister, and then said] :—Reilly was specified in the list of claimants as occupying two houses—one in George's-lane, which he first occupied—the other in Joy-street, in the town of Belfast, and he continued in successive occupation of both houses for twelve months antecedent to the 6th of July. The claimant had paid all taxes that had been assessed on him, and for the payment of which he was liable on the 1st of January, and he thus proved his qualification complete on the 20th of July.

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The objection made to the claim is, that his name was not included in the last rate made for either the house in George's-lane or Joy-street. It was established that he applied on the 4th of August to be put on the rate for the house in Joy-street; and it was objected that though Reilly claimed to be rated for the house in Joy-street, he did not claim to be rated for the house in George's-lane; and it was secondly objected that, even though his claim was right in point of form, it was made too late in point of time. The first objection is not valid. A claimant can only claim to be rated, provided he was so circumstanced as to have been entitled to be rated at the time the rate was struck. Here, he was in fact the occupier of only one set of premises at the time the rate was struck; and it is clear that he could not have claimed to be rated for other premises of which he was not occupier at that time: we have therefore no doubt as to the invalidity of the first objection.

But when the last rate was struck he was the occupier of the premises in Joy-street, but his name was not on the rate as occupier of those premises, and his claim to be rated was not served until the 4th of August. By the Act of Parliament a certain day is named for the service of notice of objection; and it is said it would be strange to hold that a person could be allowed to be rated after the time for objecting to his name had expired. Under the 110th section, the claim to be rated has relation to the time at which the rate was struck. If the claim had been complied with by the Guardians, the Barrister would have had no right to inquire when the

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applicant was put on the rate. He must have been the occupier when the rate was struck, and his name should have been inserted in the list; and until the list be published, the applicant is not to presume or suppose that the Guardians of the Union have not done their duty by omitting his name: so that the 110th section puts the claim to be rated in the same position as if the claimant were actually rated.

I was struck, during the argument, by a statement made that a party is to give notice of objection to any claimant's right to register. But this is not so—as, by the 54th section, it is plain that it does not require any notice to be given of the intention to object to a claimant. The objector merely gives notice to the Barrister that he will object, and the opposition to the claim need not take place until the Assistant-Barrister is actually presiding in Court. We are, therefore, all of opinion that in this case the Barrister was right, and we affirm his decision, but without costs, as the question raised was an important one.

AGNEW, *Appellant*; M'DONALD, *Respondent*.

Feb. 1.

A general appeal under the statute 13 & 14 Vic. c. 69, is not sufficient; the precise point of law appealed against must be stated.

THE claimant in this case sought to have his name inserted on the list of voters for the borough of Belfast, though it was not returned on the list of the clerk of the union. The statement of the Barrister was as follows:—

“Malcolm M'Donald, of Glasgow, having his qualification on the list ‘Warehouse, York-street.’”

“In this case it appeared that in the last rate for the time being, under the Poor-law, the rating was in the name of ‘M'Donald and Company,’ in respect of a ‘warehouse, York-street,’ of the net annual value of £95. It further appeared that the said Malcolm M'Donald, Robert M'Donald and David M'Donald were partners, and the only partners, in the firm in which they traded, viz.—

“‘M'Donald and Company,' and that they occupied the premises
 “in question as joint tenants for more than twelve months prior to
 “the 20th of July 1852, and that they still continued to occupy the
 “same ; and that the said firm had paid all poor-rates due and pay-
 “able in respect of said premises. The said David M'Donald stands
 “on list No. 7 unappealed from. I held that the said Malcolm
 “M'Donald was duly rated, and retained his name upon the list.

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“JOHN GIBSON.”

The notice of appeal was thus :—“I appeal from this decision.”

“GILMORE AGNEW.”

Hutton, for the respondent, objected to the appeal being heard. The statute 13 & 14 *Vic.* c. 49, only gives jurisdiction in a specific case on which a point of law is raised. No appeal is given on the general merits of the case ; and this is nothing but a general appeal. Every appeal assumes some specific fact to be put forward to ground it : 13 & 14 *Vic.* c. 49, s. 58. The 60th section enables a consolidation of appeals to be made ; the 78th section prohibits appeals on questions of fact ; and the 79th section makes the decisions of the Court binding and final on Committees of the House of Commons. These several sections are taken from the English statute, 6 *Vic.* c. 18. The point of law raised and appealed from should be stated—[TORRENS, J. It was not contemplated to make this Court a Registry Court].

Meade, for the appellant.

No precise form for raising an objection is given by the statute, and on this statement, the point sufficiently appears. That 58th section is very general, and the Court will not be astute to invalidate this statement of the Barrister, inasmuch as the claimant has nothing to do with it. This respondent is not rated either in fact or in law.—[BALL, J. If it be a question of fact, we cannot entertain it.]—The Act but requires the Barrister to state the facts, and the point of law appealed against ; that has been done, for the Barrister, after setting out the facts adds :—“I held that the said Malcolm M'Donald was duly rated.”

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 CASE.

PENNEFATHER, B.

That is matter of fact, not of law, and it is a mistake to say this document is that of the Barrister solely, for he is to read it over in the hearing of the parties who are responsible for the setting out the point of law, on which this Court is to determine. Here, there is nothing from which the Court can infer the point of law. We do not think this a case in which to exercise our discretion, and send it back to the Barrister. We will give no costs.

HENRY LOFTUS TOTTENHAM, . . . *Appellant* ;
 JOSEPH MEADOWS, *Respondent*.

Feb. 1.

A person admitted a free burgess of New Ross, after the Reform Act, and not deriving by birth, servitude, or marriage, does not require a residence in the borough to qualify as a voter, he not being an honorary freeman within the Reform Act.

THE claimant in the present instance duly served a notice upon the Town-clerk of the borough of New Ross, and the Town-clerk proved the books of the late Corporation of that borough ; by which it appeared that the claimant was duly admitted, on the 9th day of August 1837, as a "freeman and burgess" of the then existing Corporation. It was also proved that the claimant, in right of such admission, attended meetings, and signed proceedings of the Corporation. The claimant had not been for twelve months and upwards, immediately before the 20th of July 1852, nor since, residing within the borough, or within seven statute miles thereof; and the claimant was rejected on the ground of non-residence, without the question being entered into of his right to be registered as a free burgess in respect of his admission as a freeman and burgess.

The notice of appeal was in this form :—

Borough of New Ross,) " Sir—Take notice, that it is my intention
 to wit.)
 " to appeal against your decision on my
 " claim to have my name inserted in the list of voters for the said
 " borough, in virtue of being or having been a free burgess of the

“said borough, admitted subsequently to the passing of the 2 & 3 **H. T. 1853.**
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 “*W.* 4, c. 88, and which claim was this day argued before you.

“HENRY LOFTUS TOTTENHAM.

“20th day of October 1852.”

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J. C. Lowry and Tottenham, for the appellant.

A charter of incorporation of 9 *Jac.* 1 (1611) incorporated the Sovereign and free burgesses of New Ross; and the Corporation consisted of an indefinite number of free burgesses and freemen, with the Sovereign. There was no title to admission from birth, servitude or marriage. The appellant was rejected on the ground of non-residence; and the question is, whether a person admitted a free burgess after the Reform Act, and not deriving by birth, servitude or marriage, requires residence to qualify as a voter? Prior to the Reform Act, the Corporation of New Ross consisted of a Sovereign and free burgesses; and as vacancies occurred in the Corporation, they were filled up by the Sovereign and the existing free burgesses. All were elected as honorary free burgesses; and before the Reform Act, no question could have arisen, for a free burgess was entitled to be registered, though not residing within the limits of the borough. The object of the Reform Act is to extend the franchise, not to curtail it; and unless there be something in that Act to exclude the appellant, his claim is indisputable. The 7th section of 2 & 3 *W.* 4, c. 88, gives the right of voting in boroughs to be enjoyed by occupiers of houses of the annual value of £10; and the 9th section enacts—“That all freemen, freeholders
 “and persons who, by reason of any corporate or other right, are
 “now by law entitled to vote at the election of a member or
 “members to serve in Parliament for any city, town or borough;
 “and all persons who, by reason of birth, marriage or service, or of
 “any statute now in force, shall be at any time hereafter admitted
 “to their freedom in any city, town or borough, sending a member
 “or members to serve in Parliament, shall, after such registration
 “as is directed by this Act, but so long only as they shall reside
 “within the said city, town or borough, or within seven statute
 “miles of the usual place of election therein, have and enjoy such

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“right of voting as fully and in like manner as if this Act had not been passed; provided further, that no persons who, since the 30th day of March 1831, have been, or hereafter shall be, admitted as honorary freemen, shall be entitled, by virtue of such admission, to vote or register as freemen under this Act.” That section deprives certain persons of the right of voting unless they reside within seven miles of the borough—it refers to individuals, not to classes—and the claimant here does come within the second class in the section, because he was not admitted by birth, marriage or service: freemen are not free burgesses: *Molyneux's case*, 1 *Alc. Reg. Cas.* 19.—[PENNEFATHER, B. You say the appellant was not a corporator at the time of the passing of the Reform Act, nor was he one by birth, marriage or service; and being elected a free burgess, he is distinguished from honorary freemen; but is there any thing to distinguish a burgess from an honorary freeman *ex vi termini*?]—Freemen are a distinct class: 13 & 14 *Vic.*, c. 69, s. 14; and in the report of the Municipal Commissioners as to New Ross, the distinction is pointed out between the two classes. The Sovereign and free burgesses may elect any number of voters, if within the bounds of their charter. True, the Corporation is gone since the Municipal Act, but all its existing rights are in force.

No Counsel appeared against the claim.

PENNEFATHER, B.

The claimant is not an honorary freeman within the Reform Act, and therefore residence is not required. The claimant must be admitted.

H. T. 1853.
Exch. Cham.

Rev. J. STANNUS'S Case.

Feb. 1.

THE claimant in this case sought to be registered as a voter for the borough of Portarlington, as a £10 freeholder within the borough, the claim being addressed to the Town-clerk of the borough in form as follows :—

There is no such franchise in the borough of Portarlington as a £10 freehold.

“ I hereby give you notice, that I claim to have my name inserted
 “ in the list made by you of persons entitled to vote in the election
 “ of a member for the borough of Portarlington, and that the parti-
 “ culars of my qualification and place of abode are stated in the
 “ columns below.

“ Dated,” &c.

Christian Name.	Place of abode.	Nature of Qualification.	Street, &c.
Rev. James Stannus.	Lisburn.	£10 Freeholder.	Within the borough of Portarlington.

The name was on the list of claimants under the form schedule B, No. 12, 13 & 14 *Vic. c. 69*. No objection was made by any person to such claim ; but the Assistant-Barrister refused to register the claimant, inasmuch as Portarlington was only a borough, and not a county of a city, or county of a town, and that no such franchise as that claimed by the claimant in the notice existed under any statute now in force respecting the franchise in such borough.

Carleton, for the appellant.

The objection in this case is one going to the root of the qualification, and the rejection of the claimant would be a great injury : *Ashby v. White (a)*. The elective franchise was at Common Law

(a) 2 *Ld. Ray.* 950.

H. T. 1853.
Esch. Cham.
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 CASE.

an original real right attached to freehold in counties—a real right incident to the freehold. In boroughs it was incident to the tenure, hence burgage tenure, which was the same as freehold rights in counties: *Fludyer v. Lamb* (a). The statutes must be construed strictly as other disabling statutes; and the same rule applies to the statement of the Barrister. The question here is, was there a £10 freehold franchise in the borough of Portarlington, a freehold franchise existing in the borough under some statute? The 35 G. 3, c. 29, is still in force; and by its 30th section it enacts, “That no person shall be “admitted to vote at any election of a member or members to serve “in Parliament by virtue of a freehold, under the yearly value of £20, “unless such freehold shall have been in his actual occupation either “by his residing thereon, or tilling or grazing the same,” &c. This is quite general in its terms, and its language is as applicable to a borough as to a county, county of a city or a town—[PENNEFATHER, B. Would you say a person was entitled to vote both for county and borough, for that clause gives a franchise for a county, and could not give it for a borough?—If the property were situate in the borough, the voter could only vote for the borough. The 45 G. 3, c. 59, ss. 1, 4, recognises the existence of a freehold in a borough.—[PENNEFATHER, B. No; the statute recognises it in counties of cities and towns.]—But the occupation of freeholds under £20 was necessary to give the right to vote; and yet, by 1 G. 4, c. 11, s. 44, this occupation was rendered unnecessary when the freeholds were held by leases of lives renewable for ever. 4 G. 4, c. 55, dealt with the elections for counties of cities and towns; and 10 G. 4, c. 8, provided that no person should vote for counties unless he had a freehold estate of £10 a-year. Then came the Reform Act, 2 & 3 W. 4, c. 88, and by the 8th and 9th sections it recognises an existing freehold franchise in boroughs. The 8th section provides, “No person shall be entitled to vote in the election of a “member or members to serve in any future Parliament for any “city or town, or county of a city or town, in respect of any estate “or interest in any freehold under the value of £10,” &c.—[PENNEFATHER, B. The clause applies to counties of cities and towns, as

(a) *Cas. temp. Hardw.* 292.

well as towns, quite general in its terms; but there is nothing in the statute to give that franchise to towns at large, which are not in themselves counties of cities and towns: though it deals with a freehold franchise, it gives no freehold franchise; and it would be going a great way to infer a franchise from negative words. There are boroughs, such as Mallow and Dungarvan, where this franchise does exist, and the words in the section apply to these boroughs.]—It does not appear that such a franchise does not exist in Portarlington; and as that is not stated, I am entitled to assume that the higher ground did not exist, otherwise the Barrister would have rested on it, that this franchise did exist at Common Law. In his statement he says the franchise does not exist under any statute now in force. Any thing that would exclude the claimant from the operation of that 8th section should be stated, and I may assume Portarlington to be *consimili casu* with Mallow or Dungarvan. The Barrister should have negatived that.—[TORRENS, J. You are arguing a special demurrer to the Barrister's certificate.]—The notice of appeal is but preliminary, to enable the Barrister to draw the statement.—[TORRENS, J. You argue on the construction of the statute, and the Court must assume the case was so argued below; how then could we remit the case?—BALL, J. In the absence of notice to the Barrister, the Court must assume that no such objection as is here suggested exists. The Court only decide that no such franchise exists in Portarlington; it says nothing as to its existing at Common Law.]

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H. Smythe, contra, was not called on.

PENNEFATHER, B.

It is not shown that the Barrister was wrong in the point adjudicated on. So far as any statute is concerned, no such franchise as is alleged exists in Portarlington; but it is argued, that by the 8th section of 2 & 3 Vic. c. 88, an implication arises, and that an inference is to be made that the franchise may there exist; but that section has reference to Mallow and Dungarvan,

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where a freehold franchise does exist. We are then asked to remit the case ; and if we had any reason to suppose the existence of this franchise in Portarlinton, we would be loath to conclude the claimant ; but no such case as to its existence at Common Law was made before the Barrister ; and assuming that, we should not send it back for the consideration of a fact which was not submitted to him. No grounds therefore being suggested for the existence of this franchise, we disallow the appeal, but give no costs.

E. T. 1852.
Queen's Bench

FERGUSON and JOHNSTON

v.

THOMAS JACKSON

(*Queen's Bench.*)

April 28.

R. ARMSTRONG, on behalf of third persons, sureties in a bond, applied, that Thomas Jackson be at liberty to surrender himself to the Marshal of the marshalsea. Jackson had become embarrassed in his affairs, and under the 24th section of the Bankrupt Act the plaintiffs had served the ordinary twenty-one days' notice, requiring payment of a debt due them. An action had been commenced, but judgment had not yet been entered. *Ouston v. Coates (a)*. A party may be rendered before judgment. The condition of the bond in the present case was, that Jackson "do pay such "sum or sums of money, together with costs, as may be recovered "against him, or render himself to the gaoler of this Court where the "action is brought."—[CRAMPTON, J. Is that a render before or after judgment?—It may be any time before judgment. In that case of *Ouston v. Coates*, Lord Denman says:—"This was a motion by persons who had given a bond, under the 8th section of 1 & 2 Vic. c. 110, to be allowed to render their principal after verdict against him, and before judgment. The condition of the bond, as required by the Act, is to pay the condemnation money or render the defendant."

The sureties in a bond under the Bankrupt Act may render their principal at any time before judgment.

CRAMPTON, J.

The plaintiffs here may never proceed to judgment, and the sureties will be in no difficulty, but you may take a conditional rule.

(a) 2 Per. & Dav. 485.

NOTE.—The rule was made absolute in the office.

E. T. 1852.
Queen's Bench

THE QUEEN, at the Prosecution of MICHAEL RYAN,

v.

THE WATERFORD & LIMERICK RAILWAY COMPANY.

May 8.

Under the 69th section of the Railways Clauses Consolidation Act, Justices have not jurisdiction to decide whether or not there shall be accommodation works; but assuming there are to be such, they are only to decide on their kind, number and sufficiency.

R. ARMSTRONG, on behalf of Michael Ryan, applied for a writ of *mandamus*, to be directed to the Waterford and Limerick Railway Company, commanding them to build two bridges, or make such other accommodation works as would give the prosecutor a means of access to portions of his farm which had been severed by the Railway. The prosecutor held his land under an unexpired term of nineteen years and one life, at £2. 15s. an acre. The Railway Company had paid for the land actually occupied by the Railway, and also for consequential damage, namely, £10. 6s. 3d. purchase-money, and £35. 18s. 5d. for consequential damage, having taken one acre and twenty perches of the lands; but they made no allowance for severance. The yearly rent of the portion severed was £4. 1s. per annum.

Larson, for the Company.

We went before Justices, according to the provisions of the Railways Clauses Act, 69th section, who examined witnesses, and dismissed this prosecutor's complaint, and determined he was not entitled to any accommodation works. He now asks for two bridges, without specifying what sort or size they are to be of, and the building of them would cost more than the fee-simple of the property. Under 8 & 9 Vic. c. 20, ss. 69, 70, the Justices are directed to point out what accommodation works are to be made, and there is no appeal from their award; and this is an application virtually that the Justices should reconsider their decision.—[PERRIN, J. It is not a question for the Justices whether or not a party is entitled to accommodation works: they are but to determine what sort of

works are to be done.—LEFROY, C. J. The 69th section qualifies the jurisdiction of the Justices; but it does not empower them to decide on the abstract question of accommodation works.]—The summons heard before the Justices was to settle the accommodation works, and the applicant has been paid for the injury done by the severance in the consequential damages.

E. T. 1852.
Queen's Bench
THE QUEEN
v.
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AND
LIMERICK
RAILWAY
COMPANY.

LEFROY, C. J.

The applicant should have negatived that the sum received by him as consequential damages was for the value of the land only; the Justices have decided it was paid for the severance. We say—

No rule.

T. T. 1852.
Common Pleas.

BAILEY v. MASON.

April 27,
 June 1, 7.

(*Common Pleas.*)

Where the plaintiff, after the service of the writ of summons in ejectment for non-payment of rent, distrained for rent which subsequently became due; and by the notice of distress stated that such distress was made without prejudice to the year's rent due on the 25th of March, and for which ejectment proceedings were then pending:—*Held*, that such distress did not operate as a waiver of the ejectment.

THIS was an ejectment for non-payment of rent. The case was tried before the Hon. Mr. Justice JACKSON, at the Spring Assizes of 1852 for the county of Kerry. The case was argued at first on a motion for a new trial, and afterwards (at the desire of the Court) on a bill of exceptions taken by the defendant to the ruling of the learned Judge. The facts of the case, as they appeared by the notes of the learned Judge, and afterwards by the bill of exceptions, were as follow:—The writ of summons in ejectment was served on the defendant on the 6th of June 1851, and the defendant appeared thereto on the 21st of the same month. On the trial the plaintiff proved a lease, dated the 5th of July 1847, made between the plaintiff of the one part, and the defendant of the other part, by which the plaintiff demised to the defendant the house and demesne lands of Aghamore—being the lands for which the ejectment was brought—for eighteen years, from the 25th of March 1840, and for such further term as the plaintiff should obtain from the person entitled to the reversion, at the yearly rent of £236. 10s. 6d.—payable on the 25th of March and 29th of September—with a power of distress in case the rent should be in arrear for twenty-one days after any of the gale days; and if no sufficient distress should be found on the premises to satisfy the rent due, then that it should be lawful for the said Robert Bailey, his executors, administrators and assigns, to re-enter upon the demised premises. It was admitted by the defendant on the trial that he was in possession of the premises demised to him under this lease at the time of service of the summons in ejectment, and had paid rent to the said Robert Bailey.

The plaintiff's case having closed, it was proved on behalf of the defendant, that on the 12th of November 1851, the plaintiff

distrained, for a-half-year's rent due on the 29th of September 1851, and on that occasion served a notice of distress in the following terms :—

T. T. 1852.
Common Pleas.
 BAILEY
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“ Take notice that I have this day entered and made a distress
 “ for rent on all that and those the lands and premises of Ahermore,
 “ in the barony of Claremorris, and county of Kerry, for the sum of
 “ £119. 5s. 3d., being the amount of the rent demanded, and the
 “ time and times when the same accrued due as follows, viz. :—

“ £119. 5s. 3d., half a-year's rent due and ending the 29th day of
 “ September 1851 : £* rent due and ending* day of 18*
 “ £* rent due and ending* day of 18* £119. 5s. 3d., *with-*
 “ *out prejudice to the year's rent due the 25th of March last,*
 “ *for which ejectment proceedings are now pending.* And I have
 “ made such distress by the authority of Robert Bailey, of 35 South
 “ Mall, in the city of Cork, the party entitled to the said rent ; and
 “ unless such rent, and the charges of such distress, be paid within
 “ fourteen days from the date hereof, the goods and chattels so dis-
 “ trained will be disposed of according to law, for satisfaction of such
 “ rent and charges.”

The defendant, having further proved that a sale of the goods distrained took place, and that the sum of £47 was realised thereby, called upon the learned Judge to direct a verdict for him, on the ground that the distress and sale under it amounted to a waiver of the ejectment. The learned Judge having declined to adopt this course, the jury, under his Lordship's direction, found a verdict for the plaintiff.

The case was argued, on showing cause against the rule *nisi* for a new trial, by *Thomas Fitzgerald* and *Leahy*, in support of the rule, and by *J. D. Fitzgerald* and *Sullivan*, in support of the verdict ; and afterwards on the bill of exceptions, by *Macdonogh*, in support of the exceptions, and by *Sullivan* on behalf of the plaintiff. As the arguments on both occasions were substantially the same, they have been, for greater convenience, combined in the report.

For the defendant.

The plaintiff cannot have concurrent and inconsistent remedies for

* *Sic* in the bill of exceptions.

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Common Pleas.

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v.
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the recovery of the same rent—he cannot at the same time treat the defendant as a tenant and trespasser. If, where the lease is voidable at the election of the landlord, he, with a knowledge that a forfeiture has been committed, deals with the tenant in such a manner as to imply that the relation is still subsisting—such forfeiture is by a necessary inference of law deemed to be waived; and a landlord who accepts or distrains for rent which has accrued due after the forfeiture has been committed, with a knowledge of that fact, shall be deemed to have waived it: *Green's case* (a); *Doe d. Nash v. Birch* (b); *2 Furlong's Land. & Ten.*, p. 1086. The intent of the party in making the distress cannot alter the legal effect of that act; which is, that the landlord says that at the time it takes place the person distrained is his tenant. The writ of summons in ejectment is only a claim made by the landlord, and at most creates an inchoate right, which may be avoided, as by the tenant redeeming pursuant to the 9 & 10 Vic., c. 111. Nor is there any thing in the Ejectment Statutes to show that a landlord may not bring his ejectment, and afterwards waive it. The case of *Roe d. Crompton v. Minshall* (c) shows that the bringing of an action of covenant subsequent to the date of the demise in the ejectment would be a waiver of the right of entry, and an acknowledgment of the subsistence of the lease. The case of *Hume v. Kent* (d) shows that the same rule applies to ejectments for non-payment of rent.—[MONAHAN, C. J. In the first case cited, the waiver was before the ejectment was brought, and therefore before entry; but the question is, whether a party who has actually entered could waive, not the right to re-enter, but an entry actually made at the time? In the case of *Hume v. Kent*, the facts of the case show plainly that the acts did not amount to a legal tender, otherwise there would have been no equity for the bill.]—The following cases were cited: *Pennant's case* (e); *Doe d. Cheney v. Batten* (f); *Roe d. Gregson v.*

(a) Cro. Eliz. 3.

(b) 1 M. & W. 402.

(c) Bull. N. P. 96; S. C. Selw. N. P., 11 ed., 716.

(d) 1 Ball & Beat. 554.

(e) 3 Rep. 64.

(f) Cowp. 243.

Harrison (a); *Ward v. Willingale (b)*; *Doe v. Humphrey (c)*; *Doe d. Griffith v. Pritchard (d)*; *Malone v. Malone (e)*.

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For the plaintiff.

The difficulty suggested by the cases cited arises from the ambiguous meaning of the word forfeiture, which is sometimes employed to express the act of the tenant by which the forfeiture is incurred, and sometimes the act of the landlord availing himself of such forfeiture. In the former case the effect of the act may be waived by an act *in pais*; but there is no case showing that in the latter sense a forfeiture can be waived. The Ejectment Statutes having substituted the summons in ejectment for the demand and re-entry at Common Law, the landlord must be considered to have made an entry at Common Law on the day when his title accrued, and the service of the summons in ejectment therefore stands in place, not of the accrual of the right to re-enter, but of a re-entry itself. In *Jones v. Carter (f)*, it was decided that the service by the lessor upon the lessee of a declaration in ejectment for a forfeiture operates as a final election by the lessor to determine the term, and that he could not afterwards (although there has not been judgment in the ejectment) sue on the covenant for rent which subsequently accrued. In that case Parke, B., in giving judgment, says:—"It was said, "there was no authority upon the point now under consideration; "but there is a case at Nisi Prius materially bearing upon it, in "which Lord Tenterden expressed a clear opinion that the receipt "of rent, after an ejectment brought for a forfeiture, was no waiver "of such forfeiture: *Doe d. Morecraft v. Meux (g)*. We entirely "agree in that opinion." The reasoning of the Court in the case of *Dwyer v. Peacock (h)* affords an answer to the objection that the plaintiff cannot treat the defendant as both tenant and trespasser at the same time. Either the lease was determined upon the day when the distress was made, or it was not. If it was, then it must have been determined for all purposes, and no act of the plaintiff could set

(a) 2 T. R. 425.

(b) 1 H. Bl. 311.

(c) 2 East, 237.

(d) 5 B. & Ad. 765.

(e) 1 Ball & Beat. 554.

(f) 15 M. & W. 718.

(g) 1 C. & P. 46.

(h) 2 F. & S. 34.

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it up again. The defendant therefore might have replevied, and the landlord could not, for the purpose of supporting the distress, have abandoned the ejectment, for he would have been a trespasser at the time the distress was made. If the lease was not determined on the day when the distress was made, then the plaintiff, who was entitled to distrain within six months after the determination of the lease, would *a fortiori* have the power to do so up to that period. In *Doe d. Holmes v. Darby (a)*, which was an ejectment brought upon notice to quit, it was held that a distress for rent which became due after the verdict did not waive the notice to quit.—[BALL, J. That was an application after verdict to the discretion of the Court to stay the execution of the *habere*.]—The reasoning of that case, however, applies to the present—if the lease was not determined by the ejectment, there is no reason why the landlord should not have all his remedies for the recovery of the rent. But the 2nd section of 5 G. 2, which enacts—“That every lessor or lessors recovering
“in ejectments for non-payment of rent, and obtaining judgment
“and execution thereupon, shall and may have the like remedy for
“all arrears to the time of such execution executed, as such lessor
“or lessors might have had, against the lessee or lessees, his or their
“assignee or assignees, if no such ejectment had been brought, or
“judgment and execution had been obtained or enacted thereupon,” shows that it was in the contemplation of the Legislature that rent might become due after the service of the ejectment. It is settled that an action of covenant cannot be maintained on a lease which is determined. The Legislature, therefore, by enacting that the landlord shall be entitled to maintain that action for arrears of rent due up to the execution of the *habere*, must have intended to imply that up to the execution of the *habere* the lease was not determined. This construction is further aided by the terms of the 11 Anne, c. 2, which enacts that after the expiration of six months from the execution of the *habere*, the landlord or lessor shall *thenceforth* hold the demised premises discharged from the lease; which amounts to a declaration of the Legislature that the lease shall be deemed to have subsistence up to that time. A waiver of a for-

(a) 8 Taunt. 538.

feiture is a matter of intention, and cannot be held to have taken place, if, as in the present instance, the landlord has so expressed himself as to guard against the appearance of such an intention.

The following authorities were cited: *Lord Ashbrook v. Dowling* (a); *Lessee Dawson v. Coghlan* (b); *Treston v. Handcock* (c); *Nuttall v. Staunton* (d); *Bridges v. Smyth* (e); 2 *How. Exch. Prac.*, p. 106, n.

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Cur. ad. vult.

MONAHAN, C. J., now delivered the judgment of the Court.

June 7.

This was an action of ejectment, brought for non-payment of rent. The writ of summons in ejectment was served upon the 6th of June 1851. The declaration claimed a year's rent as due on the 25th of March 1851, and laid the demise upon the 21st of May in the same year. The defendant appeared upon the 21st of June, and took defence for all the lands; and on the 12th of November following, the plaintiff distrained for the half year's rent due upon the 29th of September, serving a notice at the same time that he did so without prejudice to the year's rent for which the ejectment was pending. It was admitted at the trial that at the time of the service of the ejectment, and also when defence was taken, the plaintiff was entitled to sustain it; but it was insisted that the effect of the distress was, that thereby the defendant was treated as a tenant, and that therefore it amounted to a waiver by the plaintiff of the pending ejectment. That the defendant was entitled to rely upon this as a defence to the action. Accordingly, at the trial the defendant's Counsel required the learned Judge to direct a verdict for him, which, however, the learned Judge, being of opinion that the distress constituted no defence, refused to do, and directed a verdict for the plaintiff, to which ruling the present exception has been taken. On the argument before us, the learned Counsel for the defendant have referred us to several cases which establish the

(a) Batty, 13.

(b) Hayes, 509.

(c) Smythe, Ir. Rep. 6.

(d) 4 B. & C. 51.

(e) 5 Bing. 410.

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position that if a landlord has a right to enter for a forfeiture or condition broken, and with knowledge of such forfeiture or breach of condition having accrued, he deals with or treats the tenant as still having a subsisting tenancy in the lands, he cannot afterwards bring an ejectment or make an entry founded upon such previous forfeiture. We do not question the propriety of the law as laid down in these cases, or the principle which has been deduced from them; and therefore if this were a Common Law ejectment, founded upon condition broken, we should have to consider how far the rule which I have stated would apply to a case where the recognition of tenancy was made after the entry made or the ejectment brought for the condition broken, or what would be the effect, where the act relied upon as a waiver of the ejectment and a recognition of the tenancy was accompanied with a declaration that it should be without prejudice to the ejectment then pending. But as our opinion on this case is founded upon different grounds, it is unnecessary to pursue further the questions which would arise from this view of the case. It has been argued that the landlord, by bringing the present ejectment, treated the tenant as a trespasser, and that as the statute of the 11 *Anne*, c. 2, enacts that the summons in ejectment shall stand in the place and stead of the demand and re-entry at Common Law, the lease was determined by the service of the ejectment, and the tenant accordingly became a trespasser at all events from that time. We do not think this is the true construction of the statute, in directing the summons to stand in the place and stead of the demand and re-entry. We do not think it was intended to be so generally and for all purposes, but merely to enable the plaintiff to sustain the ejectment, and to operate at the trial as proof of demand and re-entry; but that in the meantime, and until the trial, and the execution of the *habere*, the relation of landlord and tenant continues to subsist between the parties. If the landlord, before the trial, entered and expelled the tenant, he would be a trespasser by that act, which he could not be if the lease were then determined. The 2nd section of the 5 *G.* 2, c. 4, seems to us to support the same view. After reciting that doubts had been entertained whether, after judgment has been obtained, and execution executed thereupon, the lessor can

maintain an action for the recovery of the arrears due before the bringing of the ejectment, it enacts that every lessor recovering in ejectment for non-payment of rent, and obtaining judgment and execution thereupon, shall have the same remedy for all arrears to the time of such execution executed as such lessor might have had against the lessee or his assignee if no such ejectment had been brought, or judgment or execution had been obtained or executed thereupon. Now, it appears to us impossible to give any effect to the terms of this section, unless they are to be taken as a legislative declaration that arrears of rent may accrue due, up to the time when the execution is executed upon the judgment, or, in other words, that the relation of landlord and tenant subsists up to that time.

On the whole, therefore, as at the time when the ejectment was brought there was a year's rent due, and the lessor had by law a right to re-enter for the non-payment thereof, we are of opinion that he comes within the words and principle of the Act, and is entitled to recover possession of the premises, and that the circumstance of the landlord subsequently availing himself of his rights as such does not disentitle him from recovering the premises in the present ejectment. If when a year's rent was due, another gale had then become due, and the landlord, before the ejectment was brought, had been paid the last gale, leaving the previous year's rent due, in that case a question might arise whether the landlord in that case might then bring an ejectment for the one year's rent; as it might be contended that in such a case the landlord would not come within the statute, not having at the time of bringing the ejectment a right to re-enter for non-payment of rent. It is unnecessary for us in this case to consider that question, as even if in such a case it should be held that the ejectment could not be sustained, we do not think it would govern the present. The exception must therefore be overruled, and judgment entered for the plaintiff.

Judgment for the plaintiff.

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CHARLES SHARPLEY,

v.

EDWARD HORNSBY,

Secretary to the Commissioners of Public Works in Ireland.

Feb. 5, 6.

(Exchequer.)

May 28, 29, 31.

Case, by a mill owner against the Commissioners of Drainage in Ireland. The declaration contained five counts. The first three counts averred that the Commissioners wrongfully and injuriously deepened the bed of the plaintiff's mill stream, removed weirs, sluices and dams, and cut channels above the mill, and thereby lessened the working water-power of the mill.

THIS was an action on the case, against Edward Hornsby, Secretary to the Commissioners of Public Works in Ireland, and sued for the Commissioners of Drainage, pursuant to the statutable enactments in such case made and provided.

The declaration contained five counts.

First count.—“For that before and at the times of committing the grievances by the Commissioners of Drainage, as hereinafter next mentioned, the said Charles Sharpley was, and from hence hitherto hath been, and still is, lawfully possessed of a certain mill, water-wheel, machinery and premises, with the appurtenances, situate and being at Stradermot, in the county of Leitrim, and by reason thereof, before and at the time of committing said grievances, of right had and enjoyed, and of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a certain stream or watercourse, to wit the Yellow River, in the county aforesaid, which during all

The fourth and fifth counts averred that the Commissioners deepened the stream, &c., pursuant to certain Acts of Parliament, but were guilty of neglect of duty in the manner in which they prosecuted the works; also that certain specified things were not done in a proper and workmanlike manner. The plaintiff having given evidence in support of his declaration, the defendant gave in evidence the declaration of the Commissioners, under the 5 & 6 Vic., c. 89; and the *Gazette* containing the publication of the final notice, and relied on the 5 & 6 Vic., c. 89, s. 52, and 9 Vic., c. 4, s. 18, as ousting the right of action at Common Law. The learned Chief Justice (Blackburne) directed a verdict for the defendant, being of opinion that the right of action at Common Law had been taken away by the 9 Vic., c. 4, s. 18.—*Held*: that the right of action at Common Law existed, notwithstanding the 5 & 6 Vic., c. 89, or 9 Vic., c. 4, where the Commissioners exceeded their jurisdiction, or acted arbitrarily, carelessly or negligently.

Held also, that the 9 Vic., c. 4, s. 18, refers to matters of procedure alone.

Semble, per FROST, C. B.—That the declaration was insufficient to confer jurisdiction on the Commissioners.

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“the time of right ought to have run and flowed, and until the
“alteration, sinking and diversion thereof, as hereinafter next
“mentioned, of right had run, &c., and still of right ought, &c., in
“great plenty and abundance, and with great weight, force, power
“and velocity, unto, &c., the said mill, &c., of the said Charles
“Sharpley, for supplying, and did then and there supply, the same
“with water and water power for the working thereof, to wit at,
“&c.; yet the said Commissioners of Drainage, well knowing the
“premises, but intending to injure the said Charles Sharpley, and
“to deprive him of the use, &c., of the water of said stream, and to
“hinder him from working his said mill in so ample and beneficial
“a manner as he had theretofore done, and of right ought to have
“done, and to injure him in the way of his trade and business of a
“miller, which he during all the time aforesaid exercised, &c., and
“still doth exercise, &c., to wit at, &c., whilst the said Charles
“Sharpley was so possessed of the said mill, &c., and so carried on
“the trade and business of a miller, to wit on the, &c., and on divers
“other days, &c., afterwards and before the commencement of this
“action, to wit at, &c., wrongfully and injuriously cut, dug, sunk,
“excavated and made lower and deeper than theretofore it had
“been, and still of right ought to be, and caused to be cut, dug,
“sunk, excavated and made lower and deeper than theretofore it had
“been, and still of right ought to be, the bed and channel of the
“said stream and watercourse, to wit ten feet of greater depth, and
“lower than the usual and accustomed bed and channel of the said
“stream or watercourse, and kept and continued, and caused to be
“kept and continued, the said bed and channel, &c., so as aforesaid
“made lower and deeper, for a long space of time, to wit from
“thence hitherto; and thereby during all the time aforesaid unlaw-
“fully and wrongfully caused and made the water of the said stream
“or watercourse to run and flow in said bed and channel so cut,
“dug, sunk, excavated and made lower and deeper as aforesaid, at
“a level too low, to wit by ten feet, for the proper and necessary
“working of said mill, and for turning and driving the water-wheel
“and machinery thereof, and at a level lower, to wit by ten feet,
“than the water of said stream or watercourse of right ought to

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“ have run, &c., and theretofore of right had run, &c., and otherwise
 “ of right would have run, &c., and still of right ought to run, &c.;
 “ and thereby also during all the time aforesaid directed and turned
 “ the water of the said stream or watercourse away from, and
 “ rendered the same inaccessible and useless to the said mill, water-
 “ wheel and machinery of the said Charles Sharpley, and stopped,
 “ prevented, hindered and diverted the water of the said stream or
 “ watercourse from running or flowing along its usual and accustomed
 “ bed and course, unto the said mill, water-wheel and machinery of
 “ the said Charles Sharpley, and from supplying the same with
 “ water for the necessary working thereof, as the same had there-
 “ tofore done, and of right ought, &c., and otherwise would, &c.,
 “ and still of right ought, &c.; and also by reason thereof the water
 “ of the said stream, &c., during all or any part of the time aforesaid,
 “ could not, and did not, and still cannot, and doth not, run, &c.,
 “ into, &c., the said mill, &c., of the said Charles Sharpley, with
 “ such and so great weight, force, power or velocity as theretofore
 “ it had run, &c., and otherwise would, &c., and of right ought, &c.,
 “ and still of right ought, &c., whereby the amount of working
 “ water power of the said mill, water-wheel and machinery was
 “ during all the time aforesaid, and still is, greatly lessened and
 “ diminished, to wit at,” &c. The count concluded with charges of
 general and special damage.

Second count similar in form to the first, but avers that the
 Yellow River, “ Until the committing of the grievances hereinafter
 “ next mentioned, of right had run and flowed, and still of right
 “ ought to run, &c., in great plenty and abundance, and with great
 “ weight, force, power and velocity, in, into, through and along a
 “ certain weir there situate, and divers, to wit, fifty dams and sluices
 “ of the said Charles Sharpley, and so unto, into, upon and against
 “ the said last mentioned mill, water-wheel and machinery of the said
 “ Charles Sharpley, for supplying, and did then and there supply, the
 “ same with water and water-power for the working thereof, to wit,
 “ at &c.; yet the said Commissioners of Drainage well knowing,
 “ &c., wrongfully and injuriously cut, dug, sunk, excavated, altered,
 “ demolished and removed the said weir and dams and sluices, and

“kept, and continued and caused to be kept and continued, the said
 “weir, &c., cut, &c., for a long space of time, to wit, from thence
 “hitherto, and thereby during all the time aforesaid unlawfully and
 “wrongfully caused, made and permitted the water of the said
 “stream, &c., to run, &c., at a level too low, to wit, &c. ; and
 “thereby also during all the time aforesaid directed and turned the
 “water of the said stream, &c., away from, and rendered the same
 “inaccessible and useless to the said last mentioned mill, &c., of the
 “said Charles Sharpley, and stopped, &c., the water of the said
 “stream, &c., from running, &c., along its usual and accustomed
 “course in, &c., and by means of the said weir, &c., unto the said
 “last mentioned mill, &c., of the said Charles Sharpley, and from
 “supplying the said last mentioned mill, &c., with water and water-
 “power for the necessary working thereof, as the same had thereto-
 “fore done,” &c. And it also complained that thereby “the weight,
 force, power and velocity” of the stream were diminished ; and con-
 cluded with averments of general and special damage as in the first
 count.

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Third count.—After stating preliminary matter substantially the same as in the preceding counts, it is averred that the Commissioners of Drainage “Wrongfully and injuriously cut, dug, erected and made, “and caused to be cut, dug, erected and made, in and out of the “sides of the said last mentioned stream or watercourse above the “said last mentioned mill, divers, to wit fifty sluices, fifty trenches, “fifty channels, fifty cuts and fifty dams of great depth and width, “to wit of the depth of ten feet, and of the width of fifty feet, and “kept, and continued and caused to be, &c., the said sluices, &c., on “the sides of said stream, &c., for a long space of time, to wit, &c., “hitherto and thereby during all the time aforesaid unlawfully and “wrongfully divided and turned divers large quantities of the water “of said last mentioned stream, &c., away from the said last men- “tioned mill, &c., of the said Charles Sharpley, and stopped, &c., the “water of said stream, &c., from running, &c., in and along its usual “course to the said mill, &c., and from supplying the same with water “for the necessary working thereof, as the same of right ought to “have done and otherwise would have done, and by reason thereof

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“the water of said stream, &c., sufficient for the supplying of the
 “said mill, &c., of the said Charles Sharpley, during all or any part
 “of that time could not and did not run, &c., to the same, as the
 “same of right ought to have run, &c., and theretofore of right had
 “run, &c., and of right ought to have run,” &c. General damage
 is then charged, but special damage is not charged in this count.

Fourth count.—“And also for that before and at the times of the
 “committing of the grievances, &c., the said Charles Sharpley was,
 “&c., lawfully possessed of a certain other mill, water-wheel and
 “machinery immediately attached thereto, and premises, &c., situate
 “at, &c., and by reason thereof, and before and at the times of com-
 “mitting said grievances, of right had and enjoyed, &c., and of right
 “ought, &c., and still of right ought, &c., the benefit, &c., of the water
 “of a certain other stream, &c., to wit, &c., which during all that
 “time of right ought to have run, &c., and until the committing, &c.,
 “of right had run, &c., and still of right ought, &c., in great plenty
 “and abundance, and with great weight, force, power and velocity
 “unto, &c., the said last mentioned mill, &c., of the said Charles
 “Sharpley, for supplying, and did, &c., supply the same with water
 “and water-power for the necessary due convenient and permanent
 “working thereof, to wit at, &c.; and although the said Commis-
 “sioners of Drainage, whilst the said Charles Sharpley was so
 “possessed of said last mentioned mill, &c., to wit on, &c., and on
 “divers other days, &c., and before the commencement of this
 “action, to wit at, &c., in pursuance of the statutable enactments
 “in such case made and provided, cut, dug, sunk, excavated and
 “made lower and deeper than theretofore had been the bed or
 “channel of the said last mentioned stream, &c., to a great depth,
 “to wit, &c., and thereby then and there caused, &c., the water of
 “the said last mentioned stream, &c., to run, &c., in and along said
 “bed, &c., so cut, &c., at a level too low, to wit, &c., for the due, &c.,
 “working of said mill, and the turning and driving of said water-
 “wheel and machinery, and at a level lower and deeper, to wit, &c.,
 “than the said water of said stream, &c., had theretofore run, &c.,
 “and by reason thereof the water of said stream, &c., then and there
 “did not and could not, and still cannot, and doth not run, &c., into,

“ &c., the said mill, with such and so great weight, &c., as thereto-
 “ fore it had run, &c., and otherwise would have run, &c, and still of
 “ right ought to run, &c.; and although it then and there became and
 “ was the duty of the said Commissioners of Drainage to lower the
 “ said water-wheel of said last mentioned mill and the machinery
 “ immediately attached to said water-wheel, to the proper degree,
 “ extent and depth, to wit, to the degree, extent and depth of ten
 “ feet, and in a manner proper and sufficient for the due convenient
 “ and permanent working of said last mentioned mill, with the full
 “ amount of working water-power as theretofore it had been worked
 “ as hereinbefore mentioned ; and although the said Commissioners
 “ of Drainage did then and there lower the said water-wheel and the
 “ machinery immediately attached thereto, yet the said Commissioners
 “ of Drainage, well knowing the premises, but intending to injure the
 “ said Charles Sharpley, and to deprive him of the use, &c., of the
 “ water of said last mentioned stream, &c., and to hinder him from
 “ working, &c., in as ample and beneficial a manner as he had there-
 “ tofore done, and to injure him in the way of his trade, &c., which
 “ he during all the time aforesaid exercised, &c., and still doth, &c.,
 “ to wit at, &c., whilst the said Charles Sharpley was so possessed,
 “ &c., and whilst he so carried on the trade, &c., to wit on, &c., after-
 “ wards and before the commencement of this action, to wit at, &c.,
 “ wrongfully and injuriously neglected their said duty, and then and
 “ there, and during all the time aforesaid, neglected and refused, and
 “ still do neglect and refuse, to lower the said water-wheel of said
 “ last mentioned mill and the machinery immediately attached
 “ thereto to the proper degree, extent and depth, to wit, &c., and
 “ in a manner proper and sufficient for the due, &c., working of
 “ said last mentioned mill, with the full amount of working water-
 “ power as theretofore it had been worked, and then and there
 “ wrongfully and injuriously, and contrary to their said duty in
 “ that behalf, lowered the said last mentioned water-wheel and
 “ the machinery immediately attached thereto to an improper and
 “ insufficient degree, extent and depth, to wit, &c., and during all
 “ the time aforesaid kept, &c., and caused to be kept, &c., and still
 “ do keep, &c., the said water-wheel and the machinery immediately

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“ gree, extent and depth as aforesaid, to wit at, &c., and thereby
“ then and there and during all the time aforesaid caused, made and
“ permitted the water of the said stream or water-course to run and
“ flow at a level too low, to wit by eight feet, for the due, &c., work-
“ ing of said last mentioned mill, and thereby also then and there and
“ during all the time aforesaid directed and turned the water of said
“ stream or watercourse away from and rendered the same inacces-
“ sible and useless to the said mill, &c.; and also, by reason thereof,
“ the water of the said stream or watercourse, during all or any part
“ of the time aforesaid, could not and did not, and still cannot, and
“ doth not, run, &c., into, &c., the said last mentioned water-wheel,
“ &c., with such and so great an amount of weight, &c., as thereto-
“ fore it had run, &c., and still of right ought to run, &c., whereby
“ the amount of working water-power of the said mill, &c., was
“ during all the time aforesaid, and still is, greatly lessened and
“ diminished, to wit, at,” &c. General and special damage charged.

Fifth count, in form is similar to the fourth. After averring that the Commissioners had lowered the bed of the river, pursuant to certain statutable enactments, it averred that it then became their duty “ To
“ lower the said water-wheel and the machinery immediately attached
“ thereto, in a manner proper and sufficient for the due convenient
“ and permanent working of said last mentioned mill, with the full
“ amount of working water-power as theretofore it had been worked,
“ and to erect, fit and place the said water-wheel and the machinery
“ immediately attached thereto, in a workmanlike manner, and with
“ proper and durable materials; and although the said Commissioners
“ of Drainage did then and there lower the said water-wheel and the
“ machinery immediately attached thereto, yet the said Commis-
“ sioners of Drainage, well knowing the premises, but intending to
“ injure the said Charles Sharpley, &c., wrongfully and injuriously
“ neglected their said duty, and then and there, and during all the
“ time aforesaid, neglected and refused, and still do neglect and
“ refuse to erect, fit and place the said water-wheel and the machi-
“ nery immediately attached thereto in a workmanlike manner, and
“ with proper and durable materials; and then and there wrongfully

“and injuriously, and contrary to their said duty in that behalf,
 “erected, fitted and placed the said water-wheel and the machinery
 “immediately attached thereto, in a manner not workmanlike, and
 “with materials not proper and durable, and then and there wrong-
 “fully and injuriously erected, fitted and placed divers parts and
 “portions of the machinery immediately attached to said water-
 “wheel, to wit, the upright head stock and framing, and the spur-
 “wheel and bull-wheel, out of their and each of their proper places
 “and positions, and in improper places and positions, and out of
 “training and not in proper working order ; and also, then and there
 “erected, fitted and placed the main shaft of said water-wheel in an
 “improper and unworkmanlike manner, in this, that said main shaft
 “was and is erected, fitted and placed not level or horizontal, and
 “without any pivot under the inside gudgeon thereof, and also then
 “and there placed in a loose and unworkmanlike manner under the
 “said water-wheel, as and for pavement, divers, to wit, 5000 small
 “stones of shape and description, to wit, round paving stones, in-
 “sufficient, improper, and unsuited for the purpose.” The count
 concluded with averments of general and special damage.

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The defendant pleaded the general issue.

The declaration of the Commissioners, of the 30th of September 1847, so far as it related to the plaintiff's mill, was as follows :—

“Drainage and Navigation Acts, 5 & 6 Vic. c. 89 ; 8 & 9 Vic. c. 69 ; 9 Vic. c. 4, and 10 & 11 Vic. c. 79.

“DISTRICT OF BALLINAMORE AND BALLYCONNELL, IN THE
 COUNTIES OF CAVAN, &c.

“*Declaration of Commissioners of Public Works in Ireland.*

“And we do further declare that the mill at Ballinamore, in the
 “townland of Stradermot, and county of Leitrim, and the weirs,
 “dams and other works or obstructions belonging to or connected
 “therewith, and sustaining the head-waters thereof, cause flooding,
 “whereby injury is produced and improvement prevented in the
 “lands situate near the Yellow River and George's Lough (flowing
 “to and over the weir of said mill), being part of the lands proposed
 “to be improved, and set forth and described in the said schedule A,
 “hereunto annexed, to an extent in value exceeding twice the value

E. T. 1852. “of said mill. But whereas it may be found that the drainage of
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“said lands may be effected without purchasing and removing the
SHARPLEY “water-power of said mill; and whereas it may not be necessary to
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“do therefore hereby declare the amount of the actual working
“water-power of said mill to be as follows, viz. :—

“The waters of the Yellow River, when they are at and below
“the level of the present overfall, are made available in working one
“undershot wheel by the water passing through a sluice three feet
“eight inches and a-half wide, the sill of which is eight feet nine
“inches under the level of the bench mark cut on the projecting
“foundation stone of the north-west corner of Honor Meehan’s cot-
“tage, about fifty feet north of the mill; the waters which pass
“through the aforesaid sluice propel a wheel which is nineteen feet
“in diameter (from out to out of the float boards), and three feet
“six inches in breadth; the centre of the axle or gudgeon of the
“aforesaid wheel is one foot four inches under the level of said
“bench mark, and the fall from the surface of the head-waters,
“when at the level of the present head-weir or sluices (which is
“five feet one inch and a quarter below the bench mark above
“described), to the bed of the tail-water, immediately under the
“wheel, is six feet four inches. And we do further declare that
“during a portion of each year there is a deficiency of water to
“work said mill, and at other times the level of the flood water
“varies from three inches to three feet over the level of the weir,
“and in high floods the working of the mill is impeded by back-
“water.

“And we do further declare that the weir sustaining the head-
“waters of said last-mentioned mill (consisting of two piers of rubble
“masonry, and two sets of sluices of the united breadth of twenty-
“eight feet ten inches) is broken in many places, much out of repair,
“and that a portion of the waters of said Yellow River leak through
“said sluices and piers. And we do further declare that in case the
“water-power of said mill shall not be purchased or removed, either
“for the purposes of drainage or navigation, under the provisions of
“said Acts, an amount of working water-power equal to that here-

“tofore enjoyed by said mill, at and below the level of a staunch
 “regulating weir to be formed, shall be secured for working the
 “machinery thereof; and that the level of the water at which the
 “working power shall be secured will be four feet below the general
 “level of the top surface of the present weir, or sluices, and nine
 “feet one inch and a quarter below the level of the bench mark cut
 “on the foundation stone of the cottage before mentioned, and that
 “a fall equal to the fall at present available to said mill shall be
 “afforded by means of the drainage and navigation works proposed
 “to be executed in this district.”

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The case was tried before the Lord Chief Justice (Blackburne) at the Summer Assizes, 1851, for the county of Leitrim.

The facts of the case and the proceedings at the trial, as they appeared on the Judge's notes, were as follow :—On the statement of the plaintiff's case, Counsel for the defendant insisted that the plaintiff should be nonsuited, and relied on the 13th and other sections of the 5 & 6 *Vic.*, c. 89, and on the 9 *Vic.*, c. 4. The learned Chief Justice declined to nonsuit.

The plaintiff then produced several witnesses, who proved that divers injuries had resulted to his mill from the works of the Commissioners, and amongst them the diminution of the supply, as well as of the velocity, of the water that supplied it, by the removal of weirs and the deepening of the bed of the stream. It was also proved that the machinery of the mill, which had been interfered with by the Commissioners, had not been restored to as efficient a condition for working as it had been in before—for instance, the shaft was longer than the old one, and had a shake in it that injured the motion of the mill. The cogs were disadjusted. It was also made of inferior timber. It was no longer safe to stand in the mill when it was working. The inner gudgeon had not been reset in brass. Before the works, two pair of stones had been worked in the mill when occasion required, but two pair could not then be worked.

Certain documents were admitted and read on the part of the plaintiff, and amongst them certain letters between the plaintiff and an agent of the Commissioners, from which it appeared that the

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HORNSBY. plaintiff had agreed for £50 to permit the Commissioners to run off the head water from his mill for four months, ending on the 1st of October 1850. The defendant read the *Gazette* of the 26th of November 1847, that contained the publication of the final notice, and also the declaration of the 30th of September 1847.

The learned Chief Justice thereupon directed the jury to find a verdict for the defendant, being of opinion that, according to the true construction of the Act of the 9 *Vic.*, c. 4, this action could not be maintained. There was no question raised at the trial as to whether the works were or were not such in their nature as the Act authorised, nor whether or not they were within the district to which the power of the Commissioners extended.

On the 6th of November 1851, a conditional order for a new trial was granted by the Court, on the ground of mis-direction of the learned Judge, and because said verdict was against law.

Lynch, for the defendant, contended that no action at Common Law would lie against the Commissioners for the discharge of the duties imposed on them by the Act of Parliament, and that no remedy existed for a person aggrieved in such a case, except the remedy given by the Act. This is independent of another question that arises on section 18 of 9 *Vic.* c. 4, which the Chief Justice thought expressly took away any right of action at Common Law.—[Read the 18th section.]—Referred to 5 & 6 *Vic.* c. 89, s. 13; also, to ss. 32, 34, & 52, which latter was read and relied on as giving a remedy for every possible case.—[PENNEFATHER, B. Are there negative words in that section?]
—No; but there are in the 18th section of the 9 *Vic.* c. 4.

Charles Andrews, for the plaintiff, referred to 5 & 6 *Vic.* c. 89, ss. 140, 141, 142, and others, and also to 8 & 9 *Vic.* c. 69, s. 14, which regulate how the Commissioners are to sue and be sued, and relied on these sections, to show that the Common Law right was not intended to be taken away by the Legislature. In support of the Common Law right, Counsel cited *Morton v. Mahon* (a); *Corporation of Waterford v. Newport* (b); *Griffin v. Ellis* (c).

(a) 2 Ir. Jur. 238.

(b) 11 Ir. Law Rep. 359.

(c) 11 Ad. & El. 743.

James Robinson, with *C. Andrews*, relied on *Sharp v. Warren* (a). His proposition was, that 9 Vic. c. 4, s. 18, only re-enacts 5 & 6 Vic. c. 89, s. 38, and he argued that the words in the 18th section being the same as those in the 38th section, it must be held that they mean the same thing, and apply only to preliminary matters. The two Acts are to be read together: 9 Vic. c. 4, s. 44.

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Charles Kelly, in reply.

This is an action on the case, against the Commissioners as such, and if the party have a Common Law right, his remedy is trespass against the Commissioners as individuals.

Feb. 6.

Cases for which the 140th section of 5 & 6 Vic., c. 89, provides, were those of strangers, and not of persons who had got notice, and whose mills and lands were within the district.

The continuing injury is the result of justifiable works, and therefore not the subject of a Common Law right. A Common Law right is not taken away from a person who is injured by works which are not authorised by the Act. But where the works are authorised, and a remedy for the injury done by them provided, then the Common Law right is taken away. The Common Law right is confined to trespass, and not to case.

Whenever a particular remedy is given by an Act of Parliament, passed for the public benefit, the Courts will uphold the particular remedy, even without negative words, and hold it exclusive, for the purpose of avoiding a multiplicity of suits: *Governor, &c., of Cast Plate Manufacturers v. Meredith* (b). In that case Lord Kenyon was of opinion that, as the Commissioners could have awarded satisfaction, the action on the case was taken away. The certificate here states, that the Chief Justice was of opinion that the 18th section, taken with the 52nd section, took away the Common Law right of action. *Lister v. Lobley* (c); *Fenton v. The Trent and Mersey Navigation Company* (d). Those cases show that a party who has sustained damage must pursue the remedy prescribed by the statute, even though there are not negative words.

(a) 6 Price, 131.

(b) 4 T. R. 794.

(c) 7 A. & E. 124; S. C. 6 Nev. & M. 340. (d) 9 M. & W. 203.

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The 38th section refers to preliminary matters, but the 18th is general, and applies to matters preliminary as well as subsequent to the final notice.

The 52nd section gives redress for every injury that can be sustained by a party, and it is more beneficial than an action at law, and much more extensive. In the 18th section there are several independent provisions, and the negative words at the conclusion are general, and not confined to the proceedings by the Commissioners previous to the final notice. The petition mentioned in the 18th section is that given by the 52nd section.—[PENNEFATHER, B. The petition mentioned in the 18th section is applicable to every one, whether a mill-owner or not—how then can it be the petition given by the 52nd section, which is confined to cases of mills and factories alone?—There are independent sections giving compensation to persons who are owners of land.—[PENNEFATHER, B. At present I am of opinion that the 18th section of 9 Vic. does not bar the party; but I have a strong impression that 5 & 6 Vic., c. 89, s. 52, was intended to confine the parties to the remedies there pointed out, and to them only. The Chief Justice was of opinion that the 18th section did bar this action—while (as we are informed by Counsel) he considered that the 52nd section did not operate as a bar.—LEFROY, B. As the second Act is to be read with the first, I think the first repealed in such parts as the 18th section of the second Act extends to. It is a case of very great difficulty; but as at present advised, I could not assent to setting aside the verdict. I feel a difficulty like that which Lord Kenyon mentioned—this being a public body, carrying on large and extensive works, where persons may bring actions innumerable in quantity and great in extent, if they are not restricted by legislative provisions to particular remedies. The argument *ab inconvenientia* is very strong to show what may have been the intention of the Legislature.]

Cur. ad. vult.

May 25.

PENNEFATHER, B., being of opinion that the case was one of very great difficulty, desired that it should be re-argued before the CHIEF BARON, who had not heard the previous argument, and

GREENE, B., who since then had been raised to the Bench in the room of LEFROY, B., who had been appointed Lord Chief Justice.

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Lynch, for defendant, having stated his former argument, proceeded, and read ss. 13, 29, 30 and 31 5 & 6 *Vic.* The 32nd section is a proviso on these; 33rd section, preliminary declaration. These sections provide for full notice to the party affected, of all proceedings intended to be carried out by the Commissioners.—[Referred to 35th section as to appeal to Assistant-Barrister; 36th section.]—These sections provide the remedies by appeal in all cases, mills and factories included; but it gives an additional appeal in cases of mills and factories only.—[Referred to 37th and 38th sections.]—The former sections relate to the works that are to be carried on, of which all parties are to have notice. Then the 38th section made a provision, after the final notice, for the protection of the Commissioners from any proceeding which might be taken for any thing done by them.—[CHIEF BARON. That may be restricted to the procedure prescribed for them by the former sections. Do you think that a remedy could be obtained for this injury under the petition by way of appeal mentioned in the 36th section?]—It could; but there is another section which clearly provides a remedy, the 52nd section.—[Read the 52nd section.]—It seems palpable that the remedy lay within the 52nd section, if there be a remedy at all reserved.—[CHIEF BARON. The object of that section is, that after six months, when the works have been finished, the money payable for them assessed, and all things concluded, that then they should not be liable to have matters re-opened.—PENNEFATHER, B. Supposing the declaration appeared not to hurt anybody, but that the works are not afterwards consistent with that declaration, what is then the remedy for a party thereby injured?]—Your Lordship is asking what would be the result if the Commissioners did not act in accordance with the Act.—[PENNEFATHER, B. Well, be it so.]—That would come within the 52nd section. They are bound by their plans; so long as they act on those plans and keep within them, no one can complain; but when they go beyond their plans, then this section comes in, provided they present their petition within six months. That portion of the section which

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treats of the due amount of water-power shows that it applies to cases where the Commissioners exceed the declaration. The 143rd section seems to include every case of complaint. Under the first statute the case stands thus:—The Commissioners are appointed, without any emolument to themselves, to do all things prescribed by the Act, and they are protected by the Act, and the only remedy against them is that provided by the Act: *Governor, &c., of Cast Plate Manufacturers v. Meredith* (a). The work mentioned in the three first counts in the declaration is the work mentioned in the Commissioners' declaration, and which they were entitled to construct, in any view of the case.

A public officer acting in the manner pointed out by an Act of Parliament is not liable: *Sutton v. Clarke* (b); *Jones v. Bird* (c); *Hall v. Smith* (d). Those cases carry out the law as laid down in the case of *The Governor, &c., Cast Plate Manufacturers v. Meredith*.

As to the 18th section, the final notice is made to have retrospective effect, making all things done by the Commissioners complete which were done before final notice, and the last part of the section is general and unrestricted.—[PENNEFATHER, B. I would say the 18th section does not enact any thing as to owners of mills and factories.]

C. Andrews, for the plaintiff.

The cause of action is twofold—acts and omissions. The 18th section is identical with the 38th of the former Act.—[Read the 33rd section, as to what declaration should contain in reference to mills and factories.]—The declaration does not in this case contain what is required. The case in *Term Rep.* is in our favour; for there the acts are lawful, here unlawful.—[Referred to sections 140, 141, 142.]

May 28.

Andrews resumed.—[PIGOT, C. B. You need not further argue for the present that the 18th section is out of the case. The ques-

(a) 4 T. R. 794.

(b) 6 Taunt. 29.

(c) 5 B. & Ald. 837.

(d) 2 Bing. 156.

tion is whether, under the 52nd section, you are bound to adopt the remedy by petition ?]—*Rochester v. Bridges* (a). That case shows that where a right is given by statute, and a particular remedy, that remedy must be followed. *Stevens v. Jeacocke and others* (b) only establishes the same principle. But where a right existed independent of the statute—a Common Law right—the party aggrieved is not confined to the particular remedy: *Bently v. Hastings* (c); *Collinson and others v. Newcastle and Darlington Railway Company* (d); *Morton v. Mahon* (e); *Sharp v. Warren and another* (f); *Rex v. The Justices of the Borough of Leicester* (g); *Corporation of Waterford v. Newport* (h); *The Rochdale Canal Company v. King and others* (i). Those cases clearly establish the principle that the Common Law jurisdiction is not ousted where persons professing to act under an Act of Parliament exceed their jurisdiction, or act negligently or arbitrarily.

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Andrews resumed, and cited, in addition to the other cases, *Leader v. Moxon and others* (k); *Ferguson v. Kinnoul* (l); *Albon and others v. Pyke* (m).

May 29.

Robinson, with *Andrews*.

The case resolves itself into two propositions:—First, whether, in discharge of a public duty within the general purview of the Act, there is any remedy? Secondly, if so, whether the remedy is restricted to that given by the statute? *Governor, &c., of Cast Plate Manufacturers v. Meredith* (n); *Boulton v. Crowther* (o); *Grocers' Company v. Donne* (p). The principles to be deduced from those authorities are—first, that the Commissioners are not liable where they act within the scope of their authority; secondly, that they are liable when they exceed their authority; thirdly, that they are

(a) 1 B. & Ad. 847.

(b) 11 Ad. & El. N. S. 731.

(c) 8 Ir. Law Rep. 166.

(d) 1 Car. & Kir. 546.

(e) 2 Ir. Jur. 238.

(f) 6 Price, 131.

(g) 9 D. & R. 772.

(h) 11 Ir. Law Rep. 362.

(i) 18 L. J., Q. B. R., N. S., 293.

(k) 3 Wil. 461.

(l) 9 Cl. & Fin. 251.

(m) 4 M. & G. 421.

(n) *Supra*.

(o) 2 B. & C. 703.

(p) 3 Bing. N. C. 34.

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 HORNSBY. liable when they act arbitrarily, negligently or carelessly within the scope of their authority.—[Referred to the 30th section to show that they had no authority to diminish the water-power, or to interfere with the machinery ; then referred to the evidence to show that they had done both of these things.]—[PENNEFATHER, B. There is an argument on the declaration, viz., that the Commissioners have not specified sufficiently what they proposed to do, and therefore, so far as they exceeded the specification, that the Commissioners acted without jurisdiction.]—The declaration did not contain what was requisite.

Now, as to the 52nd section, whether it takes away the Common Law right. It must be taken away by express words, or by necessary intendment. There are no express words ; as to necessary intendment, the object of the section was to give a summary remedy where the party might suffer irreparable injury if left to his Common Law remedy. The words too of the section are “may” apply, not “must” apply. The defendant reads the word “may” as if it were “must.”

C. Kelly, with *Lynch*, for the defendant, replied.

If the injuries complained of were those necessarily following from the works, they are provided for by the compensation clauses, beginning at clause 66. If they are not such injuries, they are provided for by the 52nd section.

Counsel commented on the several cases cited, and claimed them as authorities in favour of the Commissioners.

PIGOT, C. B.

In this case we are of opinion that there must be a new trial. The action was brought against “The Secretary for the time being to the Commissioners of Public Works in Ireland, and sued for the Commissioners of Drainage, pursuant to the statutable enactments in such case made and provided.” The action in substance was against the Commissioners, acting, or assuming to act, within the jurisdiction conferred on them by certain Acts of Parliament, passed for the purpose of drainage and the improvement of land.

The declaration contained two sets of counts. The one stated the injuries arising from the acts of the Commissioners in drawing off a portion of the water that had previously supplied the plaintiff's mill, and preventing it from flowing with the same force and velocity it had previously possessed. The other stated the injuries arising from omissions on their part in not having adapted the position of the machinery to the altered state of the water, and the supply of inferior materials for the alterations made in the machinery; the injuries resulting were the diminishing of the water-power of the plaintiff's mill, and also damage to the machinery. Evidence was given by the plaintiff in support of those allegations.

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The defendant gave in evidence the declaration of the Commissioners relative to the operations in question; and the *Gazette* containing the publication of the final notice, as required by the statutes in question. The defendant insisted that he was entitled to a direction, to which the learned Judge acceded, being of opinion that the action could not be maintained. The case has now come before the Court on a motion for a new trial, and it is not necessary to recapitulate the evidence that was given at the trial; for it is quite clear that if the action be sustainable, notwithstanding the statutes, there was evidence given in support of the plaintiff's claim to damages, proper to go to the jury.

In argument, the defendant's Counsel contended for three propositions, viz.:—First, that the Commissioners had a public duty to perform, pursuant to the provisions of an Act of Parliament; and that as the works complained of were done in the discharge of that duty, the Commissioners were, by force of the authority given them by the statute, exempt from responsibility in an action at law. Secondly, that by the provisions of the 9 Vic. c. 4, s. 18, the right of action at Common Law was taken away. Thirdly, that if 9 Vic. c. 4, s. 18, had not that effect, still they were protected from proceedings of this nature by the 5 & 6 Vic. c. 89, s. 52, and parties aggrieved were restricted to the mode of proceeding there pointed out.

The first case that I shall refer to is that of *The Governor, &c., of Cast Plate Manufacturers v. Meredith* (a). There the plaintiffs

(a) 4 T. R. 794.

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complained of certain injuries resulting to them from the acts of the defendants, Commissioners of Paving ; and it appeared that the act complained of was authorised by the provisions of the statute under which they acted, which also gave a peculiar mode of redress to persons injured by the execution of the works ; and the Court being of opinion that the Commissioners had not exceeded their jurisdiction, the plaintiffs were bound to have adopted the remedy prescribed by the statute. Lord Kenyon, in his judgment, says :—“ If the Legislature think it necessary, as they do in many cases, they enable the Commissioners to award satisfaction to the individuals who happen to suffer ; but if there be no such power, the parties are without remedy, *provided* the Commissioners do not exceed their jurisdiction. But it does not seem to me that the Commissioners, acting under this Act, have been guilty of any excess of jurisdiction. Some individuals suffer an inconvenience under all these Acts of Parliament, but the interests of individuals must give way to the accommodation of the public.” And Buller, J., says :—“ The question here is, whether or not this action can be maintained ? and I am clearly of opinion that it cannot, because a particular remedy is pointed out by the Act. In this case, express power was given to the Commissioners to raise the pavement, and not having exceeded their power, they are not liable to an action for having done it.” The judgment there turned on this point—that the acts of the defendant were not in excess of jurisdiction ; and considering therefore the judgment in reference to the subject-matter, it is clear that it is not applicable to cases where the acts complained of are in excess of jurisdiction. Besides, if it had been intended in that case to lay down an inflexible rule for all cases in which a particular remedy has been given by statute, it would have been opposed to a previous authority.

In *Leader v. Moxton and others* (a), it was decided that an action lay against the Commissioners for Paving, who acted arbitrarily in the discharge of their duty. And although Lord Kenyon, in the case previously cited, objected to the language of the report of this case, still it is referred to with approbation in *Sutton v.*

(a) 3 Wil. 461 ; S. C. 2 Wm. Black. 924.

Clarke (a), by Gibbs, C. J., who says :—" The first is the case of *E. T. 1852.*
Leader v. Moxon. That was an action against the Commis- Exchequer.
sioners for so raising the pavement as to obstruct the plaintiff's SHARPLEY
doors and windows. The Commissioners did not exceed their v.
jurisdiction, and were exercising powers conferred on them by an HORNSBY.
Act of Parliament ; but the Court thought they were acting in a
tyrannical and most oppressive manner, and that though they had
a right to pave, and perhaps to raise, the street, they had acted so
arbitrarily that they were answerable. With that judgment this
Court entirely agrees. If the Commissioners, acting within the
jurisdiction, act wantonly and oppressively, they are responsible
to any individual for the injury they do him." The principle of
law, however, that if Commissioners, acting within the scope of
their authority, act arbitrarily, negligently or carelessly, or act in
excess of their authority, are not protected from liability, is estab-
lished by many authorities. The rule of law may be stated in the
language of Best, C. J., in *Hall v. Smith (b)* :—" If Commissioners,
under an Act of Parliament, order something to be done which is
not within the scope of their authority, or are themselves guilty of
negligence in doing that which they are empowered to do, they
render themselves liable to an action ; but they are not answerable
for such as they are obliged to employ. If the doctrine of *respon-*
deant superiores were applied to such Commissioners, who would
be hardy enough to undertake any of those various offices by which
valuable, yet unpaid, service is rendered to the country ?" This
authority shows clearly that in execution of public works care must
be taken, by the persons to whom they are entrusted, that their duty
is properly discharged ; and although the rule *respondeant supe-*
riores was there held to be inapplicable to such cases, still the
general principle of the liability of Commissioners so entrusted with
the execution of works, to have their conduct questioned in a Court
of Law, remains unaffected by that part of the decision.

Jones v. Bird (c) is another authority on the subject, that public
bodies are responsible for damage resulting from carelessness in the

(a) 6 Taunt. 42.

(b) 2 Bing. 158.

(c) 5 B. & Al. 844.

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execution of works authorised by Act of Parliament. The damage in that case did not immediately proceed from the act of the Commissioners, but was the result of an injury to adjoining buildings, suffered from their acts. The question left to the jury by Abbot, C. J., was, whether there was a want of due care and diligence on the part of the defendants? and that direction was upheld by the Court upon a motion for a new trial. Bayley, J., in delivering judgment, says:—“As to the merits of the case, it is contended that the defendants “are protected if they acted *bonâ fide*, and to the best of their skill “and judgment; but that is not enough; they are bound to conduct “themselves in a skilful manner; and the question was most properly left to the jury to say whether the defendants had done all “that any skilful person could reasonably be required to do in such “a case.”

Boulton v. Crowther (a). In that case, which is similar to the preceding ones, Bayley, J., in his judgment, again stated the rule of law in the same way, and referred with approbation to the case already mentioned, of *Sutton v. Clarke*. He said:—“There the defendants had a public trust to perform, and a public duty cast upon “them by Act of Parliament; and it was held that they, having “acted without malice and according to their best skill and diligence in the exercise of a public function, which they were compelled to execute, though they had done an act which occasioned “consequential damage to a subject, were not liable for such “damage.” And in the same case, the law is laid down most clearly by Holroyd, J. He said:—“I am of opinion that no action “will lie for what they have done in the execution of that public “duty, unless they exceed the authority entrusted to them, or abuse “that authority by acting arbitrarily, wantonly or oppressively in “the mode of carrying it into execution.”

The Grocers' Company v. Donne (b) is another authority on this subject, showing that public bodies are not exempt from liability if they either exceed their authority or abuse it; and in that case the question whether the trustees had acted carelessly, &c., was left to the jury, and held to be properly left to them. I am now on the

(a) 2 B. & C. 706.

(b) 3 Bing. N. C. 34.

question whether the action lay independently of the provisions in the statutes? It is plain that there was evidence that the Commissioners had exceeded their authority, and acted carelessly and negligently within it, to have gone to the jury. There can be no doubt of the policy of these Acts; it was to improve land in Ireland by means of drainage; at the same time milling interests were not to be sacrificed. Apart from any consideration as to the existing rights of the owners of such establishments, their importance to land is evident, as markets for agricultural produce. The value of land itself would be so materially affected by the existence and effectual operation of mills, that it would be considered as forming a part, and important part, of the policy of these Acts to maintain an immediate market for its produce by maintaining mills and other establishments of a similar nature in full and effectual working condition. Accordingly, in the first statute, provisions are introduced, where mills or factories are interfered with, that their working water-power should not be lessened: and again, where that object could not be accomplished, the Commissioners are empowered to purchase the mills or factories; but to give them that power, it must appear that the injury to lands or the improvement prevented is equivalent in value or exceeds in amount three times the value of the mill or factory, in order that the machinery of the Act should not be employed to obtain the ownership of a mill or factory, unless so great an advantage as I have stated should be thereby derived; and where that was not the case, the statute contains the most ample and elaborate provisions for maintaining the full working water-power of the mill or factory, and confers on the mill-owner the same privileges as upon the owners of land, of appearing before the Commissioners and stating any objection to the works proposed to be executed in regard to his mill or factory. This statute defines by two of its sections, viz., the 29th and 30th, the powers of the Commissioners in matters of this nature. The 29th section deals with those cases where it is not intended to interfere with the machinery of the mill, and provides that the amount of its working water-power shall not be lessened by means of the works authorised to be executed in the beginning of the section. The 30th section deals with

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 v. amount of working water-power shall not be lessened by the works
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Now, it appears to me, from the declaration of the Commissioners given in evidence, that in this case the Commissioners acted on the 29th section, without intending to affect the structure of the mill, and not on the 30th section. This circumstance is essential, with a view to the determination of the due exercise or assumption of powers by the Commissioners; and it appears plainly from the terms of the declaration that they acted under the 29th section; for the 32nd provides, "That before the Commissioners proceed to
 "take any mill or factory, and the works connected therewith as
 "aforesaid, or to effect any such constructions, erections, lowering
 "or raising, or alteration as aforesaid, the said Commissioners shall
 "insert in the declaration, which they are hereinafter required to
 "make, such statement with respect to the several matters aforesaid
 "as hereinafter directed to be made, where any mill or factory is
 "proposed to be interfered with."

Now, the 29th section enacts, "That in cases where, from the
 "damming up of any river or stream by the weir, dam or other work,
 "or obstruction of any mill or factory, occasional damage may arise
 "by the overflowing of such river or stream, it shall be lawful for
 "the said Commissioners to construct any reservoir, embankment,
 "tunnel or back drain, and erect any floodgates, sluices, overfalls or
 "other works, and to make any alterations in the dams, weirs, works,
 "obstructions or watercourses connected with such mills or factories
 "which shall be necessary to prevent the ill consequences of sudden
 "or occasional floods in such river or stream, and to provide for the
 "more safe and easy discharge of surplus water therefrom; but
 "always so that the supply of water sufficient for securing the
 "amount of working water-power theretofore enjoyed by any such
 "mill or factory shall not be thereby lessened." And there is provision made by that section that the level of the water at which such amount of working water-power shall be secured should be previously inquired into and ascertained by the Commissioners, that

all persons interested in such mill or factory, &c., should be at liberty to object to that level, and that the Commissioners should hear and decide upon all such objections, and declare what such level should be, and should state the same in the declaration thereafter directed to be made. All the provisions in that section appear to me to have been complied with in the declaration of the Commissioners.—[Read the declaration.]—In stating twice the value of the mill, they acted in accordance with the 30th section of the 5 & 6 *Vic.* c. 89, and 35th section of 9 *Vic.* c. 4; but as they did not contemplate the purchase of the mill, they go on to declare the amount of actual working water-power; and they declare that an amount of working water-power, equal to that heretofore enjoyed by said mill, shall be secured, and they declare the level, and also that a fall, equal to the fall at present available to the said mill, shall be afforded by drainage and other works purposed to be executed. There is no doubt but that this may be effected by competent and skilful engineering, and that the working water-power may be fully maintained at a less fall, by a proportionate increase in the velocity of the water. It appears to me therefore that the Commissioners have acted in strict compliance with the terms of the 29th section.

The 30th section enacts “ That if any weir, dam, &c., connected
 “with any mill or factory, shall cause the flooding of any lands
 “included in any district in which the Act shall be brought into
 “operation, situate near the stream or river flowing to or over such
 “weir, dam, &c., so as thereby to injure such lands or prevent their
 “improvement, and in such flooding cannot, in the opinion of the
 “said Commissioners, be otherwise remedied or prevented, it shall be
 “lawful for the said Commissioners, so far as shall be necessary for
 “remedying or preventing such flooding, injury, or such impediment
 “to the improvement of such lands as aforesaid, to alter any such
 “dam, &c., or the position or level thereof, and to raise, or lower
 “or alter any water-wheel or any machinery immediately attached
 “thereto, and the levels of the head and fall of any water to such
 “mill or factory; provided always that in all cases where any such
 “raising, lowering, or alterations as aforesaid shall be effected, the
 “amount of working water-power of such mill or factory or water-

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 “additional wheels, fittings, buildings, machinery, sluices, cuts, dams,
 “gates, and all other such works and things as shall be suited to
 “such raising, lowering, modification and alteration respectively
 “necessary or proper and sufficient for the due convenient and
 “permanent working of such mill or factory, with such full amount
 “of working water-power, shall be made, provided, &c., by the said
 “Commissioners in a workmanlike manner, and with proper and
 “durable materials,” &c.

Now, taking these two sections together, I think it was the imperative duty of the Commissioners to have determined and stated in the declaration that in their opinion the alteration could not be effected without lowering or altering the weir, dam, water-wheel, or other machinery; and then the 32nd section contains an express direction, “That before the said Commissioners shall proceed to take
 “any such mill, &c., the said Commissioners shall insert in the
 “declaration, which they are hereinafter required to make, such
 “statement with respect to the several matters aforesaid as ‘herein-
 “after directed’ to be made in cases where any mill or factory is
 “proposed to be interfered with.” What is that statement “herein-
 after directed?” It is that statement contained in the 33rd section, and is as follows:—“And in all cases wherein any mill or factory,
 “&c., shall cause flooding, so as thereby to injure or prevent the
 “improvement of such land as aforesaid, it shall be stated in such
 “declaration that such mill or factory, &c., causes the flooding
 “whereby such injury is produced or improvement prevented, and
 “whether such injury or prevention of improvement be to an
 “extent in value or exceeding three times the value of such mill
 “or factory; and in case such injury or prevention of improvement
 “be to an extent in value less than three times the value of such
 “mill or factory, it shall be stated in such declaration whether in
 “the opinion of the Commissioners the flooding of said lands cannot
 “be remedied without altering such dam, weir, &c., or the position or
 “level thereof, and also the amount of actual working water-power
 “of such mill or factory, also the level of the water at which the
 “amount of working water-power theretofore enjoyed by such mill

“ or factory can be secured ;” and “ in all cases where it is proposed
 “ to interfere with any mill or factory, or any works or appurtenances
 “ thereof as aforesaid, the said Commissioners shall deliver or cause
 “ to be delivered to the owner or occupier of any such mill or
 “ factory, or to his clerk, &c., a copy or duplicate of such declaration
 “ as aforesaid, together with a written description of such part of
 “ the proposed works as shall be intended to be executed at or in
 “ respect of such mill or factory, and all persons may inspect and
 “ take extracts of or copies from such declaration,” &c. It is plain,
 taking these two sections together, that the object of the Legislature
 was, that the mill-owner should be apprised of the works intended
 to be effected, in order that he might have the opportunity, with
 the two documents mentioned in the 33rd section, viz., the decla-
 ration and the written description before him, of considering the
 effect of the proposed works, or perhaps of consulting an engineer,
 and taking his opinion as to what was necessary for his protection ;
 so that if he conceived or was advised that he would be injured by
 the proposed works, he might seek redress by means of an appeal
 to the Assistant-Barrister, as prescribed by the 35th section. It
 is also clear, by a consideration of these sections together, that it
 was the intention of the Legislature that the declaration should be the
 permanent record of the intention of the Commissioners with regard
 to the contemplated works. It could not be altered, or its speci-
 fications tampered with. But it was a voluminous document, and
 contained several details, according to the provisions of the statute
 under which it was framed ; and the statute accordingly requires
 that together with the declaration there should be served a written
 description of such part of the proposed works as should be intended
 to be executed at, or in respect of, such mill or factory, that the mill-
 owner might be most distinctly apprised of the works that were in
 contemplation.

It seems quite plain then that the declaration should contain a
 specification, either by reference to the written description, or by its
 incorporation, to enable the mill-owner to take advice for his protec-
 tion. But when it is considered that there is an appeal given, and
 what the appeal is against, it is obvious that the works proposed to

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be executed should appear on the declaration. By the 35th section it is enacted, "That if any person shall be aggrieved by the declaration which shall be so made by the Commissioners, or by any thing contained therein or omitted therefrom, or by any other act, deed, matter, or thing whatsoever, &c., it shall and may be lawful for such person to appeal against or in respect of such declaration, or any such act, deed, &c., to the Assistant-Barrister," &c. And by the 36th section it is provided, "That in all cases of appeal respecting mills or factories only, if the said Commissioners or appellant shall be dissatisfied with the decision of the Assistant-Barrister, it shall be lawful for the Commissioners or appellant, within one month after such decision, to apply by petition in a summary way to the Court of Chancery or Exchequer, by way of appeal against such decision, &c., provided also that the proceedings on such petition shall not, in case the decision of such Assistant-Barrister shall be in affirmance of such declaration, stay the prosecution of such works, but the Commissioners may proceed with the same, subject to such order of such Court respecting the prosecution, modification, or stoppage of such works, or respecting such mill or factory, or for compensation to the party interested therein, or otherwise, as the Court may deem just," &c. There is then an appeal against the declaration by the former of these sections, and the latter section shows that the nature of the works must be before the tribunal to which the appeal is given—otherwise how is it possible that a decision can be arrived at with respect to "the prosecution, modification, or stoppage of the works?" &c. That tribunal knows nothing of the works except from the declaration, that is, the record. It is plain, therefore, from the power of modification, &c., that the works must be specified. Again, several sections speak of the works proposed "to be executed"—39, 40, 52; and does not the term "proposed," used in those sections, show that the works should be specified in the declaration? Thus see to what extent the 9 *Vic.*, c. 4, s. 15, indicates the same thing. By that section, which takes away in a great measure the power of appeal (for it was deemed advisable, from having had experience of the propriety of the proceedings of the Commissioners, to relieve them from many of the

preliminaries), the right to appeal against "certain things" is left untouched. What are they? against the "declaration in respect of any mill or factory," &c. And what is the proviso at the end of the section, "provided always that no appeal against any such "declaration in respect of any mill or factory shall stay the execution of the works proposed to be executed, except as regards the "execution of such works or alterations as may be proposed to be "made in any such mill or factory, or the works appertaining "thereto." Now, it is plain to any one that it was intended there, that the declaration should contain the information necessary to enable the Assistant-Barrister to decide with respect to the works proposed to be made in any mill or factory, or the works appertaining thereto. How is that possible, unless the works proposed to be executed are specified? Confining myself to ss. 30 & 32, it appears to me that before the Commissioners could confer on themselves the power of interfering with the works, it was necessary for them to determine in what way they would interfere, and to express that determination. Consider the consequences of holding the contrary:—no means whatever would exist of ascertaining the intentions of the Commissioners. There are only two things from which those intentions can be gathered—the declaration, and the notice or written description. If the declaration is silent on the matter, and no notice is sent to the mill owner, there cannot be any information on the subject, and there can be no appeal by the mill owner. If the Commissioners could commence the works without specifying them in the declaration, or serving notice, the mill owner would practically be denuded of his right of appeal; and that alone would be a sufficient reply to the argument that the Commissioners may assume jurisdiction to enter upon works without setting them forth in their declaration; and the very facts before us in this case show the impracticability there may exist of obtaining the remedy by appeal; for what are the circumstances under which the Commissioners obtained possession? The declaration was made in 1847, and they then proceeded with the works; and in 1850 a letter was written to the plaintiff for liberty to occupy the premises for four months while the water was run off. The plaintiff replied by the

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document under which the Commissioners took possession. Now, suppose that no information was afforded by the declaration or notice—for four months the plaintiff cannot enter, and cannot ascertain what are the alterations effected, until it is too late to appeal. The statutes were intended for the benefit or protection of the mill owner as well as of the Commissioners; but it would be utterly impossible for him to protect himself, without some information of what the Commissioners intended to do. Without saying how far information on a subsequent investigation may be afforded of the Commissioners having done that which was necessary to confer jurisdiction under the 30th section, so far as I can judge, they have not in the present case established that they have done what was required to confer jurisdiction under that section, although they have proved sufficient to confer on themselves so much of the jurisdiction as is given by the 29th section. I am at present dealing with the case as regards the liability of the Commissioners, apart from any consideration or argument that arises on the 5 & 6 *Vic.*, c. 89, s. 52, and the 9 *Vic.*, c. 4, s. 18. I am dealing with the Commissioners as a public company, having duties to perform, and on the presumption that they are not exempted from an action at Common Law, either where they exceeded their jurisdiction, or, though acting within it, acted arbitrarily, carelessly or negligently. I am not about to state what evidence there was to support such a state of things. I do not say that either element existed; but that was a question for the jury, whether they provided such an amount of working water-power as they were bound to provide, and if not, whether the failure arose from negligence: in either case they were liable to an action, unless protected by the provisions of the statutes in question.

The next question is whether the 9 *Vic.*, c. 4, s. 18, exempts the Commissioners from actions at Common Law, and limits an aggrieved party to the remedy by petition provided by the 52nd section of 5 & 6 *Vic.*, c. 89. By the 18th section it is enacted “That no error or
 “misdescription, misnomer, mis-statement, or omission in any of the
 “schedules, maps, plans, sections, estimates, declarations, or memorandum of declaration or notices, by the said recited Acts or this
 “Act required to be prepared, lodged, registered, or given by the

“said Commissioners, shall invalidate the same, or any of them, or
 “any of the proceedings under the said recited Act or this Act;
 “and from and after the publication of the final notice in and by
 “the said first recited Act or this Act directed to be given before
 “the commencement of any works by the said Commissioners, no
 “error or omission whatever in any of the proceedings preliminary
 “to the issuing of such final notice shall be deemed to affect or
 “invalidate any such proceedings, or the powers or authority of the
 “said Commissioners, &c., nor to affect or invalidate any award, &c.,
 “nor any other matter or thing done or omitted to be done by the
 “said Commissioners previously or subsequently to the publishing
 “of such final notice. * * * And it shall not be lawful for
 “any person whatever in any manner to question or appeal against
 “or in respect of any thing whatsoever done or omitted to be done
 “by the said Commissioners under the provisions of the said recited
 “Acts or this Act (save only by petition to the Court of Chancery
 “or Exchequer, as by the said first recited Act is allowed in cases
 “of appeals respecting mills or factories only); nor shall any pro-
 “ceedings to be had or taken by or on behalf of the said Commis-
 “sioners for the purpose of the said recited Acts or this Act be
 “removed or removable by *certiorari* into any of her Majesty’s
 “Courts of Record.”

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The whole of the first part of that section is applicable to *proce-*
dure, and has reference to errors and omissions; it is not that after
 final notice every thing done by the Commissioners in the execution
 of the works shall be regular, but it is that no error or omission shall
 be fatal to any of the proceedings: that part of the section, therefore,
 does not save them from the responsibility of their acts in carrying
 out the works. But it is argued that by the words “in any manner
 to question any thing whatsoever done,” in the latter clause of the
 section, it was intended by the Legislature that the acts of the Com-
 missioners should be exempt from being questioned in any other
 manner than that prescribed, and of course exempt from being
 questioned by an action at law. But having regard to the preceding
 part of the section, the true construction appears to me that these
 large words in the latter clause must be controlled by the preceding

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ones (which refer to matters of procedure alone), and be construed as referring to matters *ejusdem generis*. I am strengthened in that view by the words employed, "question or appeal;" it must be something which could be questioned or appealed against by the former statutes—that was preliminary matter. But when we look to the 5 & 6 Vic., c. 89, the matter is free from doubt—they are *in pari materia*, and are to be construed as one.

The 38th section of 5 & 6 Vic., c. 89, enacts "That the publication of any such last mentioned notice shall be deemed final and conclusive evidence that the several preliminary measures, proceedings, &c., have been duly taken and observed; and after such publication it shall not be lawful for any person to question or appeal against or in respect of any thing whatsoever done or omitted to be done by the said Commissioners, under any of the provisions hereinbefore contained, save only by such petition to the Court of Chancery or Exchequer as aforesaid."

Now the words of the 18th section are evidently a copy of the words of the 38th section, with the exception of the words "under the provisions of the said recited Acts or this Act," in the former section, instead of the words, "under any of the provisions hereinbefore contained," in the latter section. These words, if expounded irrespective of context, might mean any provision "in said recited Acts or this Act;" but when we find the words of the 18th section correspond with the words of the 38th section, according to the ordinary rule of construction they must be held to apply to the same thing—that is, to matters of procedure.

The only remaining question I have to deal with is the 52nd section of the 5 & 6 Vic., c. 89—whether the remedy provided by it is the only remedy? The words in that section are not "shall apply," or even "shall and may," but merely "may." It might be enough to refer to the rule that the Common Law right is not to be taken away without express words or necessary implication. This construction of the statute is in unison with the recent decision of this Court, in the case of *Morton v. Mahon*, referred to in the course of the argument, as also with the case of *Sharp v. Warren* (a), which appears to me directly applicable; and that rule we adopt in

(a) 6 Price, 131.

the present case. In the latter case it was decided by the Court that the intention of the Legislature was not to take away the remedy which the Common Law had provided, before the passing of the Act, for injuries of that nature, but to provide a more effectual remedy. The remedies provided by the Legislature were in those cases held to be accumulative. It is not like conferring a new right, and giving a specific mode of proceeding upon it—for it is clear, on the authorities, that then the prescribed remedy must be adopted; but that is not the case when, as here, the remedy conferred by the statute is given simply in furtherance of an old right, and which does not take away the old remedy, either by express words or necessary intendment. We are of opinion that neither the 52nd nor the 18th sections take away from the plaintiff his Common Law right of action, if he can establish either excess of jurisdiction or negligence on the part of the Commissioners in the discharge of the duties imposed upon them. I deem this case one of such great public importance, that I have very fully stated my views on the different questions that were presented to the Court in the course of the argument; but I do not wish to be understood as resting my judgment on the insufficiency of the declaration for the purpose of conferring the jurisdiction assumed by the Commissioners, as it is unnecessary in the present case pointedly to decide that question.

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The defendants, substantially in the present case, are a public body, of considerable importance in this portion of the empire, and entrusted with great powers, and, in the exercise of those powers, with a large discretion; but I cannot admit that they are altogether without responsibility. We are now called upon to consider this most important case, for the purpose of deciding whether or not we are to reverse the opinion of the learned Judge before whom the action was tried; and having considered the case, and, differing as we do from that learned Judge, it is still a matter of no surprise that in a question so complicated as the present—turning as it does upon the construction of two Acts of Parliament containing very numerous sections and provisions—the attention of the Judge

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As to the effect of that section upon the present case, I need only say that I fully concur in the view taken by the CHIEF BARON, viz., that it must be construed as applicable to matters of procedure alone, and that the remedy given in it by appeal cannot be intended to apply to any tortious act of the defendants, and therefore cannot have the effect of taking away the consideration of the case from the jury, which was sought to be left to them by the plaintiff for their decision.

The CHIEF BARON has so ably reviewed the authorities bearing upon the main question in the present case, that I need not reconsider them more than to state the principle deducible from them, which is, that where a body of persons are entrusted with powers for the execution of works for the public good generally, they are not to be held liable to any action from injuries that may result from acts done by them in the due and proper discharge of their duties; and they are not to be held responsible for the consequences of their acts, even where the statute has not provided any remedy or recompense for the injuries to individuals that may necessarily ensue. But that doctrine is by the authorities limited to acts done within the scope of their authority, and which are performed in a manner neither arbitrary, negligent or careless. Now, without saying whether the defendants had acquired jurisdiction to enter upon the works at all, or not, it appears clear that there was a case to go to the jury that they had acted incautiously, carelessly and arbitrarily. Whether they can repel that case or not, we cannot say. It is enough now to say the question should have been left to the jury; and on that ground alone it appears to me that the verdict

ought to be set aside, being of opinion that neither the 18th or 52nd sections take away the Common Law right of action. E. T. 1852.

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It has been argued, and I may say that it appears to me, that the declaration made in this case was not in accordance with the 30th section of 5 & 6 Vic. c. 89, which is to be incorporated with the 33rd section; but I desire it to be distinctly understood that I do not rest my judgment on this part of the case; and that however I may agree with the CHIEF BARON in his views, I express no opinion upon it. Therefore, whether the declaration was right or wrong (and I am disposed to think that it was faulty), or whether, if faulty, it took away the jurisdiction of the Commissioners, or whether it might be cured by the 18th section, upon these questions I do not deem it necessary to express any opinion, the more especially as this question was not raised before the learned Judge who tried the case, and the parties have therefore had no opportunity of discussing them. It is sufficient to state that in my opinion there was evidence of negligence, sufficient at least to go to the jury, and that the Common Law right of action is not taken away either by the provisions of the 52nd section of 5 & 6 Vic. c. 89, or the 18th section of 9 Vic. c. 4. I think the construction given by the CHIEF BARON to that section correct; but if I was not so certain as I am on that subject, I think the verdict ought to be set aside, as our decision, if it were given against the plaintiff, would leave him without remedy; while, if it be given against the defendants, it affords them an opportunity for further investigation, and also for having the matter placed upon the record.

I desire to make an observation in reference to an expression attributed to Chief Justice Best, in the case that has been cited, of *Hall v. Smith*, which might lead to the supposition that the Commissioners should not be held responsible for the acts of the persons employed by them. But I do not think that that was the meaning of the case, or that the rule of *respondeat superior* is at all shaken by that authority. The meaning of that decision is, that if under the special provisions of an Act of Parliament a public body like the present is obliged to employ particular persons under them, then that such a public body, for the conduct of those persons, should not be held responsible, and that the rule *respondeat superior* could no longer be safely, or with justice, applied; but in the present case the

E. T. 1852. Commissioners were at liberty to employ any engineers or professional persons whom they pleased ; they were bound by the Act of Parliament to employ skilful persons, but not any particular persons, and therefore the Commissioners are not within the protection of the rule I have mentioned.

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GREENE, B.

It is not to be wondered at that the learned Judge who tried this case should have arrived at a decision, upon the construction of the 18th section, that the Court now upon full consideration conceive to be erroneous ; for that section, when considered by itself, might very well, from certain general expressions it contains, be deemed sufficient to oust the plaintiff's Common Law right of action, and restrict parties seeking redress to the remedy prescribed ; and it is only by considering the provisions of the first Act that I have arrived at the conclusion that the 18th section has not taken away the Common Law right of action. I am also of opinion, with the rest of the Court, that the 52nd section does not limit the mode of redress. With respect to the compliance of the Commissioners with the provisions of the Act of Parliament as to the declaration ; the CHIEF BARON has very fully gone into that question : and though I agree with him that the Commissioners' declaration is not framed in compliance with the statutable provisions, still the very large words of the 18th section, curing all errors and omissions, &c., both prior and subsequent to the final notice, might, I think, be considered as giving validity to the declaration ; and I am not certain that the Commissioners are not protected in that respect : but on this part of the case I do not wish to be understood as expressing any positive opinion, as I conceive the order for a new trial should be made absolute, on the grounds stated by my Brother PENNEFATHER, that the right of action is not taken away by either 5 & 6 Vic. c. 89, s. 52, or 9 Vic. c. 4, s. 18, and that there was a question to go to the jury as to whether or not the Commissioners were guilty of such negligence and improper conduct in the conduct of the works as must entitle the plaintiff to obtain compensation at Common Law.

Cause shown disallowed, and order for new trial made absolute.

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Queen's Bench

In the Matter of the Estate of ROBERT ATKINS ROGERS.

(*Queen's Bench.*)

April 20, 27.

THIS was a special case, sent (pursuant to 12 & 13 Vic. c. 77, s. 15) by the Commissioners for Sale of Incumbered Estates in Ireland for the opinion of this Court.

The case stated that William Rogers (deceased), being seised of an estate in fee-simple of and in the lands of Laystown and others, under the will of Philip Lavallier, by his will, bearing date the 1st of December 1817, devised as follows:—

“I, William Rogers, make this my last will and testament. As
 “to all my estates, real and personal, which I am entitled to under
 “or in virtue of the will of Philip Lavallier, Esq., situate in the
 “county of Cork, and in the liberties of the city of Cork, and all
 “other property whereof I may be seised or possessed of, or in any
 “manner entitled to, I give, devise and bequeath the same unto
 “Hamelin Trelawney, my brother-in-law, his heirs, executors, ad-
 “ministrators and assigns, upon trust to permit and suffer my father
 “Joseph Rogers, in the event of his surviving me, and his assigns,
 “for and during his natural life, or so many years as he may live,
 “to receive the yearly rents, profits, &c., of the same; and from and
 “after the decease of the said Joseph Rogers, in the event of my
 “brother Robert Atkins Rogers surviving him, to the use, benefit
 “behoof and advantage of him the said Robert A. Rogers, his heirs,
 “executors, administrators and assigns for ever, or for and during
 “such other estate or estates as are or may be acquired in said
 “respective estates and properties. I hereby authorise my father,

Testator de-
 vised certain
 estates upon
 trust to per-
 mit his father
 during his life
 to receive the
 rents thereof;
 and from and
 after his de-
 cease, to the
 use of testa-
 tor's brother
 R. A. R., his
 heirs, execu-
 tors, adminis-
 trators, and
 assigns for
 ever. The
 will then con-
 tained this
 proviso:—
 “Notwith-
 standing the
 devise hereby
 before made
 for said R. A.
 R., I hereby
 direct, order
 and devise
 that the said
 R. A. R. shall
 have but a *life*
estate in all
 said estates
 and property,
 and that in
 the event of
 his having one
 or more child
 or children
 lawfully be-
 gotten, then
 said estates
 shall go and
 descend to

such issue according to the usual course of family settlements, to the first and every other son, and, in default of male issue, to the issue female; and if no such issue, then to such uses, &c., as my said father shall appoint by deed or will.” *Held*, that R. A. R. took an estate for life, with remainder to his first and other sons in tail male, and ulterior limitations over.

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"in the event of his becoming seised under this my will, to demise
 "said estate, or any part thereof, as may be necessary, at the im-
 "proved rent of the day, but nothing fixed; and I appoint my
 "father and the said H. Trelawney executors of this my will.—
 "In witness whereof I have hereunto set my hand and seal this
 "1st day of December 1817."

This will was then attested in due form. Then followed this direction :—

"Provided, however, notwithstanding the devise hereby before
 "made for said Robert A. Rogers, I hereby direct, order and devise
 "that the said Robert A. Rogers shall have *but a life* estate in all
 "said estates and property, and that in the event of his having one
 "or more child or children lawfully begotten, then said estates shall
 "go and descend to such issue according to the usual course of
 "family settlements, to the first and every other son, and, in default
 "of male issue, to the issue female; and if no such issue, then to
 "such uses, estates, shares and purposes as my said father shall
 "appoint by deed or will."

This was also duly attested at the foot thereof.

The testator died thus seised, without altering or revoking his will, leaving his father and Robert A. Rogers him surviving. His father died, leaving Robert A. Rogers him surviving, without having exercised the power of appointment given by the will.

The question submitted for the opinion of this Court was, what estate or estates did the said Robert A. Rogers take in said lands and premises under the devise or devises in said will?

R. R. Warren and *Exham* appeared on behalf of the eldest son of Robert A. Rogers.

R. A. Rogers took but an estate for life. That was evidently the express intention of the testator in introducing that proviso or direction at the end of the will. The word "issue" there used must apply to the children of Robert A. Rogers: *Ridgeway v. Munkit-trick* (a). It ought to be so construed, unless there be an evident intention in the will to the contrary. "Children" is a word of

(a) 1 D. & War. 92.

purchase, and not of limitation; and the testator, by directing that the estates should descend according to the usual course of family settlements, clearly intended to make the children purchasers. Where an estate is given to a man and his heirs, that estate may be cut down by subsequent words in the will: *Lowe v. Davies* (a); *Goodtitle v. Herries* (b); *Mandeville v. Lord Carrick* (c); *Crozier v. Crozier* (d); *Hodges v. Middleton* (e).

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Longfield and Martley, contra.

Robert A. Rogers took an estate tail. The testator, by using the words, "in default of issue male," intended merely that the male issue should take before the issue female, but not so as to exclude females; for it is plain he meant the issue were to take indefinitely before the father's power of disposition became available. If Robert A. Rogers only took a life estate, that intention could not be carried out; but what we say is, that he took an estate in tail male, with remainder in tail general: *Robinson v. Robinson* (f); *Mellish v. Mellish* (g); *Parr v. Swindels* (h); *Doe v. Cooper* (i).

Exham, in reply, was stopped by the Court.

LEFROY, C. J.

In this case we are relieved from the difficulty imposed by the rule in *Shelly's case*, respecting the meaning of the words "heirs," and "heirs of the body," for there are no such words here to prevent us carrying out to the fullest extent that sound rule of construction, namely, to let every word of a will have as full an effect as possible. Can we then ascertain the general intent of the testator, and give effect to the language of this will? The general intent was to give the father a life estate, and ultimately a power of disposition;

(a) 2 Ld. Ray. 1561.

(b) 1 East, 264.

(c) 3 Ridg. P. C. 352.

(d) 3 D. & War. 353; S. C. 5 Ir. Eq. Rep. 415.

(e) 2 Doug. 430.

(f) 1 Burr. 38.

(g) 2 B. & C. 520.

(h) 4 Rus. 283.

(i) 1 East, 229.

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but that that power should not enure until the antecedent objects of the testator's bounty were provided for in the manner he intended. The antecedent objects of his bounty were the children male and female of Robert Atkins Rogers; and the testator did not design that the estate should be passed away until they were provided for; and if there were no other means of effectuating that provision than by giving an estate tail—either tail general, or male, or female, to the ancestor—although the effect of that would be to vest in the ancestor a power to bar his issue, yet it never has prevented the construction of the ancestor taking an estate tail: and the reason is plain, because thereby the children have a possibility of taking, which is better than nothing.

But can we give to the ancestor here an estate for life, and provide for the children effectually, before the estate go over on the subsequent limitation? The words of the will are:—"The said estate shall go over and *descend* to such issue according to the usual course of family settlements—to the first and every other son; and, in default of male issue, to the issue female; and if no such issue, then to such uses, &c., as my said father shall appoint," &c. We are to see whether effect can be given to that word "*descend*." It is clear that, according to the case of *Wight v. Leigh* (a), if this will did not contain the words "go and descend according to the usual course of family settlements," there would be no way of giving estates to the male and female issue, without giving an estate tail to the ancestor; but we cannot expunge sensible and intelligent words from the will. It is just as if testator had said that his estates shall go in the manner in which, according to the usual course of family settlements, estates are limited to the first and other sons, &c.; and this is made still more specific by the testator's stating that there were to be successive estates, for he adds, "in default of male issue, to the issue female; if no such issue, then," &c. There can be no doubt that there are words which, if applied to the first sons, would enlarge the estate into one of tail male; but then the words, "according to the usual course of family settlements," show that the sons were to take as purchasers. The issue female are to be provided for; but

(a) 15 Ves. 564.

there is no expression respecting them, according to the usual course of family settlements. How, then, are they to be provided for? We are aided by the expression, that the estates shall "go and descend" to such issue. We do not require those words to give estates to the sons, because there is sufficient in the will to give them estates as purchasers. These words, therefore, would apply to the daughters, and I would couple them with the father's estate, so as to give the daughters estates tail, enabling them to take by descent through the father.

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Thus we give every word of the will effect, and violate no rule of law. There is a distinction between trusts executory and executed; and when any thing remains to be done, a Court of Equity will feel no difficulty in giving a construction to the instrument, having regard to that something to be done. Here the testator has not expressed to the full extent what he intended by the first limitation; but he refers to the usual course of family settlements, and we may take judicial notice of what that course is. Upon these grounds, we are of opinion that Robert A. Rogers took an estate for life, and his first and other sons estates in tail male.

The Court gave the following certificate :—

We have heard this case argued by Counsel, and are of opinion that Robert Atkins Rogers took a life estate under the will of the testator William Rogers, with limitations to his first and other sons in tail male, and ulterior limitations over; but no question having been put to us with reference to those limitations, we refrain from giving any opinion thereon.

T. LEFROY.

P. C. CRAMPTON.

L. PERRIN.

R. MOORE."

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THE GUARDIANS OF THE POOR OF THE
 LIMERICK UNION

v.

WHITE.

[RESERVED CASE.]

April 26.

Premises untenanted previous to and at the time of striking of a poor-rate, though held by the owner for the purpose of letting to a tenant, are not liable to be rated for the relief of the poor.

THIS was a case reserved by Monahan, C. J., from the Spring Assizes of the county of Limerick.

The case stated that a civil-bill had been brought by the plaintiffs against the defendant, to recover a sum of £4. 7s. 3d., alleged to be due for poor-rate out of premises in the city of Limerick. That the premises in question were stores, which had formerly been in the possession of a tenant of the defendant; but they had been surrendered to the defendant some time previous to the striking of the rate which, by the civil-bill, was sought to be recovered. That the premises continued to be and were untenanted at the time of the striking of the rate. That the defendant made no use of them whatsoever, but was anxious to obtain a new tenant. On these facts the Assistant-Barrister held that the rate was valid, and gave a decree for the plaintiffs, which decree was affirmed by Monahan, C. J., on appeal; but he entertaining doubts on the matter, reserved the case for the opinion of the Twelve Judges.

J. D. Fitzgerald appeared on behalf of the Poor-law Guardians.

Assuming that the premises were untenanted, and in no way used at the time the rate was struck, the objection here made could only be raised on an appeal to the Quarter Sessions; it is no defence to an action for the rate: *Churchwardens of Birmingham v. Shaw* (a); *Fawcett v. Fowlis* (b); *Marshall v. Pitman* (c).

(a) 10 Q. B. 868.

(b) 7 B. & C. 394.

(c) 9 Bing. 595; S. C., 2 M. & Sc. 745.

The case of *The Guardians of the North Dublin Union v. Scott* (a), which will be relied on as governing the present case, is not a sound decision, and ought to be overruled.—[At this stage it was intimated by some of the Judges that, in the way this case came before them, they had but the jurisdiction of a Judge of Assize, and therefore should hold themselves bound by the ruling in *North Dublin Union v. Scott*, being the decision of a Court *in Banco*; but after some discussion they resolved on hearing the arguments.]—The owner of premises entitled to the beneficial occupation is the occupier within the meaning of the 1 & 2 Vic. c. 56, and that beneficial interest need not necessarily be a valuable interest. Un-tenanted premises may be utterly valueless to the owner, yet still he has the beneficial occupation.

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 ———
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 v.
 WHITE.

Charles R. Barry, for the defendant.

The fallacy of the argument on the other side consists in the supposition that we put the matter on the footing of a valuable and beneficial occupation. We do not rely on such ground. Under the Poor-law Acts, the person rateable is the person in the actual occupation of the premises; and on no principle of construction can an owner of an unoccupied house be held to be in actual occupation. The 61st and 71st sections of the statute 1 & 2 Vic., c. 56, in express terms, require actual occupation; and no constructive occupation can satisfy the language of those sections: *The King v. The Inhabitants of St. Nicholas Rochester* (b); *Rex v. Morgan* (c). The interpretation clause of the 1 & 2 Vic., c. 56, also defines "occupier" to include the person in immediate use and enjoyment of the hereditament. It would be strange to say that the landlord of a house tenantless, and a burthen and expense to him, instead of a source of profit, was in the use and enjoyment of it.—[CRAMPTON, J. Suppose an owner to be himself a tenant to a house paying a rent, and that he does not choose to occupy the house, would you contend that he would not be rateable?]—If he retained the house for his own occupation, and from caprice or any other motive left it unoccupied, he would, no

(a) 1 Com. Law Rep. 76.

(b) 5 B. & Ad. 226.

(c) 2 A. & E. 618.

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doubt, be rateable : for instance, a man may have a town house and a country villa—the one occupied by him in the winter, the other in the summer months—he would be properly rateable in respect of both, because he retained both for the purpose of his own occupation and use ; but where a man has a house which he in no manner uses himself, but devotes it wholly and *bonâ fide* to the purpose of letting to tenants—so long as such a house remains unset, untenanted and unoccupied, it is not a rateable hereditament.—[CRAMPTON, J. The interpretation clause defines an occupier to be every person in the immediate use and enjoyment of any hereditament, whether corporeal or incorporeal. Now, an incorporeal hereditament is not susceptible of that actual physical occupation for which you contend ; and does not the interpretation clause, therefore, seem to oppose your construction of the words occupier and occupation ?]—The inference from that clause seems rather the other way, for the Legislature thereby intimate that the words occupier and occupation, as used in the body of the Act, could only have the meaning we contend for ; and therefore they were compelled to extend their meaning, by express enactment, to incorporeal hereditaments, to which the words in their own proper signification would not apply.

As to the other point, that this is only matter of appeal—that is not so. *Birmingham v. Shaw* is clearly distinguishable from the present case. There the rate was *prima facie* valid, and the exemption relied on was special matter of exemption. Here it is different—here the rate was void in its inception ; and in such a case, the person improperly rated may either defend an action, or replevy a distress levied for the rate : *Guardians of the Castlebar Union v. The Earl of Lucan*(a) ; *Milward v. Caffin*(b) ; *Bristol Union v. Wait*(c).

The Judges, having consulted, were of opinion that the facts stated afforded a valid defence to the action ; and thereupon reversed the decree, and ordered a dismiss, without prejudice to issue.

(a) 13 Ir. Law Rep. 44.

(b) 2 W. BL 1330.

(c) 1 A. & E. 264.

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Queen's Bench

BARR v. DUFFIN.

May 24.

DIX, on behalf of John Kane, applied for an order that the proper officer should receive and enrol the memorial of the assignment of the judgment in this cause. The judgment had been obtained by one William Sayers against the defendant in Easter Term 1844, for £190, and was assigned to John Barr on the 8th of November 1844. He died in January 1849, and in November 1849 his son John Barr obtained administration to him, and afterwards went to Toronto, in America, where he had duly executed an assignment of the judgment to John Kane, the present applicant. The assignment and memorial were executed by John Barr at Toronto, and were witnessed by John Henry and John Heming, and the latter had made the usual affidavit of the assignment of the memorial by John Barr. This affidavit was engrossed at the foot of the memorial, and purported to have been made before Thomas Barnes, the Mayor of Toronto, who had attested and signed the jurat, describing himself as Mayor, and had also attached to it the corporate seal. There was also an affidavit of the execution of the memorial, made before a Commissioner of this Court in Monaghan, by J. Delacour, who verified the signature of the Mayor, and that he was Mayor of Toronto, and as such had power to administer oaths and take affidavits.

An affidavit of the execution of a memorial of an assignment of a judgment before the Mayor of Toronto, in Canada, whose signature and authority to administer oaths were verified by oath before a Commissioner of this Court:—*Held* sufficient to justify the Court in ordering the memorial to be enrolled.

The officer had refused to enrol the memorial of the assignment, because the affidavit of the execution of the assignment and memorial had not been made before the officer or officers where such judgment was entered, or his or their deputy, or before any of the Judges of the Superior Courts here or at Westminster, as required by 9 G. 2, c. 5, or before a Commissioner for taking affidavits in England, Scotland or Ireland, as required by 3, 4 Vic., c. 105, s. 76.

Dix contended that, under the 212th General Order, the affidavit was sufficient, the signature of the Mayor of Toronto having been verified by affidavit.

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MOORE, J.*

I think the case comes within the 212th General Order; and its requisites having been complied with and followed, I will make an order, directing the officer to receive and enrol the memorial of the assignment.

* *Solus.*

NOTE.—212th General Order.—“When any affidavit, intended to be used in any proceeding in any of the said Courts, shall have been sworn before a Judge in England or Scotland, the Judge's signature to the jurat shall be verified by affidavit; and if sworn before any other person except a Commissioner appointed for taking affidavits in England or Scotland, or a British Consul, the signature of such person to the jurat, and his authority to administer oaths and take affidavits, shall be verified by affidavit, or by the certificate of a Notary Public.”

May 25,

June 1.

In re MOLTON.*

A testator devised lands to his son as tenant for life, with remainders in strict settlement; and in the will was contained a large leasing power, together with a power to charge and incumber the lands and premises with a maintenance or jointure for any wife the devisee might

THIS was a special case, sent by the Court of Chancery for the opinion of this Court.

marry, to such amount as he may deem expedient, “in proportion to the portion he may receive with such wife.” The will also contained a power to charge the lands with £4000 for younger children, in such shares as the donee might think fit. The son married a lady who brought him no fortune, and he, by his will, charged the lands with £200 as jointure for his wife.—*Held*, that the power was well exercised.

The case stated that Albert Stubbeman duly made and published his will, bearing date the 21st of June 1830—whereby, after several general bequests and legacies, he devised and gave all his real estates, charged with the payment of a certain annuity to his wife (since deceased), unto his son Denis M. Stubbeman and his assigns, for and during the term of his natural life, with remainder to trustees to preserve contingent remainders, with remainder, from and after the decease of his said son Denis M. Stubbeman, to the use of such one or more, or all and every son and sons of the body of his

* MOORE, J., *absente.*

said son lawfully to be begotten, and the heirs male of the body or bodies of such one or more, or all and every son and sons, in such shares and proportions, and to the exclusion of an elder son (if his said son should be so minded), as his said son should by any deed to be executed as thereby prescribed, or, by his last will, direct or appoint, with remainder, in default of appointment, to the first and other sons of Daniel M. Stubbeman in tail male, with remainders to all and every the daughter and daughters of his said son, as tenants in common, in tail male, with divers remainders over. The will contained the following provisoes:—

“ Provided also, that it shall be lawful for my said son, and I do
“ hereby empower and authorise him, to make any lease or leases of
“ all, or any part, of my said estates, notwithstanding the limitations
“ hereinbefore contained, for such estate or term of lives or years
“ as he may think advisable, and at such yearly rent or rents as he
“ may deem fit; and to commence in possession or reversion, at the
“ good pleasure of the said Denis M. Stubbeman.

“ Provided also, that it shall be lawful for my said son, and he is
“ hereby empowered, to charge and incumber the said lands and
“ premises with a maintenance or jointure for any wife he may
“ marry, to such amount as he may deem expedient, *in proportion*
“ *to the portion he may receive with such wife.*

“ Provided also, and it is my further will and desire, that it shall
“ in like manner be lawful for my said son, by any deed or settle-
“ ment in writing, to be made upon, or previously to, his marriage,
“ to charge the said lands with the payment of any sum or sums of
“ money not exceeding £4000, for the portion or portions of any
“ younger son or younger sons or daughters of such marriage, not
“ for the time being entitled to said lands, or any part thereof; the
“ same to be payable in such manner, and to such heirs, and in such
“ shares and proportions, and subject to such limitations, as my said
“ son shall think fit.”

The case further stated, that Albert Stubbeman died without altering or revoking said will, leaving the said Denis M. Stubbeman his eldest son him surviving, who thereupon became, under said will, seised of the several lands thereby devised, for the term of his

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natural life, with such power of jointuring as therein contained; and being so seised, afterwards, on or about the 1st of December 1840, intermarried with Catherine Molton; and upon the occasion of said marriage the said Denis M. Stubbeman did not receive any portion whatsoever with the said Catherine Molton.

It further stated that Denis M. Stubbeman afterwards made his will, bearing date the 17th of July 1841—whereby, among other bequests, he gave to his said wife £200 per annum, to be paid to her half-yearly out of the rents of the lands left him by his father. He subsequently died without revoking said will, and leaving no other issue but Anne Stubbeman as survivor, who thereupon became, under the limitations of the will of Albert Stubbeman, seised of the lands as tenant in tail.

The opinion of this Court was required on the following question :—

Whether the will of the said Denis M. Stubbeman is, or is not, a valid execution of the power to jointure contained in the will of the said Albert Stubbeman ?

T. R. Henn, with him *J. D. Fitzgerald*, for the jointress.

This jointure was well charged upon the estate by the tenant for life : *Cumberford's case* (a). In *Talbot v. Tipper* (b), lands were settled, with power to the appointee to make leases, with fine or without fine, and rendering such rents and services as he shall think fit: the appointee made a lease without rendering rent, and the Court held this a good execution of the power—it being to reserve such rent *as he shall think fit*; and he having thought fit to reserve no rent, that could not avoid the execution of the power, and especially he not having paid such yearly rent. *Goodtitle v. Funucan* (c). There, under a power to lease all manors, messuages, &c., so as there be reserved as much rent as is now paid for the same, such parts of the estate enumerated in the power as have never been demised may be let; and Lord Mansfield in that case observes :—“ Powers “ are now a common modification of property in land; and as such,

(a) 2 Roll. Abr. 262.

(b) Skin. 427.

(c) Doug. 565.

“are to be carried into effect according to the intention of those who create them;” and he cites the rule laid down by Lord Holt:—“That where a qualification is annexed to a power of leasing, which, if observed, goes in destruction of the power, the law will dispense with such qualification:” *Long v. Long* (a). In *Edgeworth v. Edgeworth* (b), it is laid down:—“If such construction can be given to an appointment as will secure the real object, the Court will not disappoint provisions for children because the parent has in part misconceived his power. On instruments providing portions, the Court has assumed a latitude of exposition which it does not on other instruments:” *Cooke v. Farrand* (c). The intention is to be deduced from the whole will: 1 *Sug. Pow.*, p. 527; *Sheehy v. Muskerri* (d). Baron Alderson there observes (p. 584):—“There is no case, we believe, to be found in our books, in which a lease conformable to the literal tenor of the words in which the power is given has been held invalid at law, on the ground of any supposed or real hardship thereby inflicted upon the remainderman; and it would be strange if such a case could be found: for, as the remainderman takes what is given to him, subject to the power, he must take the advantage *cum onere*, and has no reasonable ground for complaint if that should happen which the framer of the power, who had the *jus disponendi*, contemplated.” Here the tenant for life, under the leasing power, had absolute discretion to alien the whole inheritance; therefore it is not reasonable to suppose he was to be tied up in his jointuring power. The donee is the sole judge of the reasonableness of the amount.

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M. Barry, and J. E. Pigot, contra.

It must be contended on the other side that this is an unrestricted jointuring power; but here the condition imposed by the donor is a condition precedent; and the Court is called on to treat the words as unnecessary and contradictory: *Creagh v. Wilson* (e). There a man gave to his grand-daughter £200, on condition she

(a) 5 Ves. 445.

(b) Beat. 334.

(c) 7 Taunt. 122.

(d) 1 H. Lds. Cas. 576.

(e) 2 Vern. 572.

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continued under the care of his executors until she was twenty-one; but if she was taken from them by her father, who was a Roman Catholic, before she attained that age, or if she should marry against the consent of his executors, then he gave her but £10. The daughter was placed by the executors with a clergyman, who, before she was twenty-one, with consent of one of the executors, permitted her to make a visit to her father; and he took that opportunity to marry her to a Roman Catholic. It was decreed that she should only have the £10, as the legacy was given subject to a condition precedent: *Earl of Tyrconnell v. Duke of Ancaster* (a).

Every word in the will should have effect, and yet the Court are called on to reject the words imposing the condition and restriction. The remainderman is to be considered: *Chance on Powers*, p. 2004; *Aleyn v. Belchier* (b). There can be no doubt that the words plainly import a qualification in the power, and that qualification should be regarded. The intention can but be collected from the entire instrument, and that is the guide to the construction of the power: *Churchman v. Harvey* (c); *Pomery v. Partington* (d).

J. D. Fitzgerald replied, and cited *Wrixon's case* (e).

Cur. ad vult.

LEFROY C. J.

June 1.

The question in this case is as to the validity of a power of jointuring, and arises under these circumstances:—D. M. Stubbsman made a will containing several powers; and as the construction of any one of them may affect the others, I shall read them all.—[His Lordship read the leasing power.]—That power permitted the son to make leases for such terms and at such rents as he might think fit; indicating the fullest intention to give absolute dominion over the property to the the tenant for life, so that in reality he might have

(a) 2 Ves. sen. 500.

(b) 1 Eden, 132.

(c) 1 Amb. 339.

(d) 3 T. R. 665.

(e) 4 Ir. Jur. 73.

alienated the entire property by leasing the lands at nominal rents.

Then comes the jointuring power on which the question arises.—
[His Lordship read the power.]—That is a power to charge and encumber the lands and premises with a maintenance or jointure for any wife the testator's son might marry, to such amount as the son might deem expedient, in proportion to the fortune he might receive with such wife. Then there is a power to charge £4000 as portions for younger children, subject to such limitations as testator's son should think fit; which shows that when the testator intended to impose a limit as to the extent of a particular power, he expressly intimated such intent.

But here it is objected, the power as to jointuring the wife was not well exercised, because the son charged the lands with £200 a-year for that purpose, he admittedly having received no portion with his wife. It was argued that the general power was accompanied by a qualification, that where the lady had fortune, the power of jointuring should be regulated by that fortune; and on the other hand it was said that the receipt of fortune from the lady was a condition precedent to the exercise of the power. Several cases of powers (not jointuring ones), leasing powers, have been cited (and why should the same rules of construction not apply to both?) where there was a reservation of such rents as the donee of the power might think fit. The cases of *Goodtitle v. Funucan*, and of *Talbot v. Tipper*, are in point; but there is an earlier case of *Winter v. Lovedale* (a), where Lord Hardress thus lays down the rule:—"where a qualification is annexed to a power of leasing, "which if observed goes in destruction of the power, the law will "dispense with such qualification;" and Lord St. Leonards, commenting on these cases, expresses a strong opinion in favor of the principle of them: *Muskerry v. Chinnery* (b).

If there be a general power given, in clear and unambiguous terms, and the donor wish to import a qualification into it, that should be expressed in terms equally explicit, otherwise we might be effectuating a qualification in destruction of a general power. Where there is a power to let lands at such rents as they have

T. T. 1852.
Queen's Bench
In re
MOLTON.

(a) Carth. 429.

(b) L. & G. 225.

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been heretofore letten, and it turns out that some of the lands were never before let, it has been held that the power to let will not be abridged by the qualification as to the unletten lands. Another class of cases affords an analagous rule:—it has been held that words of recommendation will turn an absolute bequest into a trust; as where property is devised by a parent, advising the legatee to leave such property to his children, that converts the bequest into a trust for the children; but if there be any uncertainty as to the extent to which the children are to take, then the recommendation fails in turning the bequest into a trust. In the case before the Court, there is an absolute uncertainty with respect to the fortune or the portion which was to regulate the jointure; the words being “to such amount “as he may deem expedient, in proportion to the portion he may “receive with such wife.” There is all that uncertainty as to the qualification which was held in the other cases sufficient to prevent its operation.

Talbot v. Tipper went so far as to decide it was unnecessary to reserve any rent at all, under a power “rendering such rents and services as he (the donee) shall think fit.” There is no reason why the rule of that case should not apply to a power of jointuring, especially where, in the same instrument, the power of leasing is given in very large terms.

The Court are of opinion the power of jointuring has been well exercised by the testator. Subsequently they gave the following certificate:—

We have heard the case argued by Counsel, and we are of opinion that the will of Denis M'Carthy Stubbeman, in this case mentioned, is a valid execution of the power to jointure, contained in the will of Albert Stubbeman, in said case mentioned.

T. LEFROY.

P. C. CRAMPTON.

L. PERRIN.

June 5.

T. T. 1852.
Queen's Bench

CURRY v. JOHNSON.

June 5.

BLACKHAM, on behalf of the plaintiff, moved for liberty to amend the writ of summons issued and served in this cause, by adding the residence of the plaintiff. This is necessary under the second section of the Process and Practice Act; and the third section of that Act authorises this amendment, as it is merely a verbal or technical omission in the writ: *Ross v. Gandell (a)*. The Court will not allow a writ of summons to be amended by adding the residence of the plaintiff.

LEFROY, C. J.

The Court are of opinion that this amendment ought not to be allowed. The amendment referred to in the case cited was an amendment of a technical omission, the plaintiff having given substantially his place of residence. Here the question is, whether this is a mere verbal or technical omission, or one calculated to mislead the party? It is clearly calculated to mislead. If the defendant had known the residence of the plaintiff, he might have tendered the debt and costs; and if we were to make this amendment, it would be encouraging disregard to the rules of the Court.

No rule.

(a) 13 Jur. 941.

M. T. 1852.
Queen's Bench

RYAN v. MASSY.

Nov. 3.

A and B entered into a joint and several bond, with warrant of attorney to confess judgment thereon. The bond was a simple money bond, but the warrant of attorney referred to the provisions of an annuity deed executed contemporaneous therewith. By this deed, A granted an annuity to the plaintiff, chargeable on certain lands in the deed named; and it was thereby agreed that if any gale of this annuity should be in arrear, it should bear interest, and that a receiver should be appointed; and in case he should be interfered with in receipt of the rents, or in case same should be insufficient, that plaintiff might proceed under the powers conferred by the deed or the judgment collateral therewith. Three gales of the annuity being in arrear, plaintiff issued execution without a previous assignment of breaches—*Held*, that such execution was irregular, and ought to be set aside.

J. D. FITZGERALD, on behalf of the defendant, moved that the writ of *fiery facias*, and the execution had thereon, be set aside—the same having issued irregularly on a judgment, without an entry on the record of any suggestion of breaches, or of any breach of the conditions and purposes of the bond on which the judgment was obtained.

It appeared from the affidavit made in support of the motion, that Francis Massy and his two sons (one of whom was the defendant) executed their joint and several bond, bearing date the 6th of September 1848, with warrant of attorney to enter judgment thereon, to secure the payment to the plaintiff by Francis Massy, who was tenant for life of certain lands, of an annuity of £91. 17s., charged by deed of the 1st of September 1848 upon those lands. The bond was a simple money bond for £1200, conditioned for the payment of £600; but the warrant of attorney, collateral therewith, referred to the provisions of the annuity deed. By this deed, after reciting the bond and warrant of attorney, Francis Massy, the father of the defendant, in consideration of the sum of £600, granted an annuity for the life of the said Francis Massy, of £91. 17s., to the plaintiff, charged upon certain lands therein named; and it was thereby agreed that if any gale of this annuity was in arrear for the space of three months, same should bear interest: it also contained the usual clauses for distress and re-entry in case of non-payment; and it gave power to the trustee of the annuity, in case of non-payment, to sell or mortgage all or any part of the lands thereby granted. A receiver was also thereby appointed; and the deed provided that if this receiver should, during the lifetime of Francis Massy, be hindered, prevented or interfered with in any manner in the receipt

of the rents of said lands, or in case same should be insufficient for payment thereof, then it should be lawful for the plaintiff or his trustee to proceed, under the powers given them by said indenture, or on the judgment collateral therewith, to recover said annuity and all arrears thereof; and that upon the death of Francis Massy, and payment of all arrears of the annuity and interest, the plaintiff should satisfy said judgment—it being declared that same was confessed as a further or additional security for the payment of said annuity, with full power, however, for the plaintiff, in case of default in any gale or payment of said annuity, to have recourse to said judgment, and to act thereon as he might think fit to recover payment of same.

M. T. 1852.
Queen's Bench

RYAN
v.

MASSY.

On the 3rd of June a *fieri facias* was issued on foot of this judgment, marked for the sum of £638, and the Sheriff levied thereunder a sum of £222. 19s. 6d. It was admitted that, at the time of the levying the execution, there was only £137. 15s. 6d. due on foot of the annuity, for three half-yearly gales.

Fitzgerald.

The primary object of this deed was that the lands should be liable in the first instance; and it was only in case of default of payment by the receiver that the judgment was to be proceeded on against the defendant. This is a case clearly coming within the provisions of the statute 9 W. 3, c. 10, requiring breaches to be assigned; and the fact of the judgment being entered pursuant to a warrant of attorney makes no difference, as it is now settled that such judgments come within the provisions of that statute: *Stratton v. Codd* (a); *Delacour v. Murphy* (b), recognised in *Montgomery v. Byrne* (c): it was there held that the provisions of the statute are mandatory, and could not be waived by agreement between the parties: *Erskine v. Beatty* (d). Admittedly, in *Austerbury v. Morgan* (e), *Kinnersley v. Mussen* (f), and *Shaw v. The Marquis of Worcester* (g), it was held that the statute did not apply to judgments entered on warrants of attorney; but in *Erskine v.*

(a) 9 Ir. Law Rep. 1.

(b) 13 Ir. Law Rep. 195.

(c) 2 Ir. Com. Law Rep. 230.

(d) 2 Jones, 471.

(e) 2 Taunt. 195.

(f) 5 Taunt. 264.

(g) 6 Bing. 385.

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Beatty, in the argument of which all these cases were cited, Pennefather, B., giving judgment, says :—" I do not profess to understand " the reasons upon which the decisions in the King's Bench here " and in England proceed. It is said in them that judgments upon " warrants of attorney are subject to the equitable control of this " Court, and therefore not within the 9 *W.* 3, c. 10, If there be a " mere warrant of attorney given, without an accompanying bond, " the Court may perhaps have an equitable jurisdiction over the " judgment entered in pursuance of it; but in this country there is " no such practice as that of giving a warrant of attorney without a " bond; and the principles relative to such cases do not appear to " me to be applicable to the present, &c. I am of opinion that we " have no equitable jurisdiction over bonds and judgments upon " them, and that we ought to hold, as we have always held, that it " is by the statute imperative on the plaintiff in such cases to suggest " breaches on the roll." It has, however, been held in England, that on a bond conditioned for the payment of an annuity, breaches must be assigned : *Walcot v. Goulding* (a), recognising *Roles v. Rosewell* (b); *Hardy v. Bern* (c); *Collins v. Collins* (d).

D. Lynch, and *Lawless*, contra.

The intention of the execution was only to levy the one year and a-half due on foot of the annuity, and that is the practice directed to be followed in *Gorman v. Hincks* (e); for if the writ were endorsed for the sum to be levied only, that would amount to a satisfaction of the judgment. The case of *Stratton v. Codd* only established the general principle as to judgments on warrants of attorney—that alone is not sufficient to take the case out of the statute. *Smith v. Bond* (f) draws the distinction, and decides that when the sum due is a mere matter of calculation, breaches need not be suggested : here, *eo instanti* the land ceased to be available, the bond came into force, and it then became a mere matter of calculation on the bond.—[MOORE, J. Would it

(a) 8 T. R. 126.

(c) *Ibid*, 540.

(e) *Batty*, 354.

(b) 5 T. R. 538.

(d) 2 Burr. 820.

(f) 10 Bing. 125.

not become more than a mere matter of calculation to show how much had been paid out of the lands ?]—In *Montgomery v. Byrne*, accounts of a bank were involved, and there the judgment was given as a security for future advances: 1 *Saund.*, 58, a; *Lane v. Montgomery* (a); *Burke v. The Kingstown Railway Company* (b).

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Jellett, in reply, was not called on.

LEFROY, C. J.

There can be no doubt that this case comes within the statute 9 W. 3, c. 10. The object of that statute was, that wherever there is a collateral agreement, the performance of which is secured by a penal sum in a bond on which judgment has been entered by warrant of attorney—that in such a case breaches must be suggested. Formerly there was no remedy but through the medium of a Court of Equity; and hence the object of the statute enabling the plaintiff to obtain an inquiry of *quantum damnificatus*, without having recourse to a Court of Equity. Here the argument was that the annuity should in the first instance be levied out of the rents and profits of the lands; but if the person interested in the levy was interrupted in obtaining it in that way, then he might proceed under the judgment; it is, therefore, not the case of a bond simply for the payment of an annuity, but a bond with a penalty for securing the performance of a collateral agreement, providing that whatever was not levied off the lands was to be the actual sum recoverable under the judgment. It is, therefore, a case for a suggestion of breaches.

CRAMPTON, J.

I am also of opinion this is a case coming within the statute. If it were the case of a judgment given to secure the payment of a mere personal annuity, I am not prepared to say I should make the same rule as in the present instance; but this is a special agreement that the annuity is to be paid off certain lands, with a judgment collateral, which was to be resorted to only in the event of that annuity not being paid. It would be important here to ascertain

(a) J. & B. 217.

(b) 2 Law Rec., N. S., 24.

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that no breach of the contract, such as the arrears of the annuity not being paid out of the lands, had been committed before the execution issued on the judgment—for that was a preliminary to the issuing of the execution. But I give no opinion as to a case where the amount of the judgment was payable by instalments, or by an annuity not subject to a special agreement.

PERRIN, J., and MOORE, J., concurred.

Motion granted.

H. T. 1853.

Jan. 5, 8.

KEARSE v. DREW.*

This Court will not allow a suggestion to be entered on the record to change the venue in an action of *scire facias*; the venue in such action should be where the original judgment was entered, viz., county of the city of Dublin. *Brew v. O'Brien* (2 Ir. Com. Law Rep. 159) disapproved of.

COFFEY, on behalf of the defendant, applied for liberty to enter a suggestion on the record, that the action in this case could be more conveniently tried in the county of the city of Dublin than in the county of Clare, that being the venue in the original judgment. The action was one of *scire facias*, and we seek to have the venue in Dublin—following the principle of the case of *Burke v. Jennings* (a). In *Hearne v. Hayden* (b), the Court of Common Pleas say, if it appear on the affidavit that if the action could be more conveniently tried in the place to which it is sought to change the venue, they will allow a suggestion to be entered.

Charles Barry, contra.

According to the Exchequer practice, the proper venue in *scire*

* A difference of practice between the Courts, as to the venue in *scire facias*, has led to this case being printed out of the usual order.

(a) 5 Ir. Jur. 151.

(b) 2 Ir. Com. Law Rep. 225.

facias is where the defendant resides.—[CRAMPTON, J. Is it at all necessary in such a case as this to enter a suggestion? I am sorry the Courts have not long since adopted the English practice in *scire facias*, following the writ by a declaration so that the plaintiff may lay his venue where he pleases.]—But this is a motion to change the venue to where it should have been originally—or to change it from a proper venue.—[MOORE, J. Before the 171st General Order, the proper venue was Dublin; and, notwithstanding the General Rule, it is still the proper venue.]—In *Brew v. O'Brien* (a), the Court of Exchequer carried the principle too far; and in *Hearne v. Hayden*, the Court of Common Pleas refused to enter a suggestion.—[CRAMPTON, J. Before the 171st General Order, if an action of debt on a judgment had been brought, the defendant must be served in his county, but the venue may be laid in Dublin; and that is but a continuation of the old action of *scire facias*.]—If the county where the defendant resides be the proper venue, according to *Hearne v. Hayden*, a sufficient ground should be laid to change it, and that has not been done here. If Dublin be the proper venue, this motion is unnecessary.

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LEFROY, C. J.

We say no rule. There is no occasion for a suggestion, as the venue in the action follows the venue in the original judgment. The 171st General Order simply relates to the service of the writ of *scire facias*; and in giving judgment in that case of *Brew v. O'Brien*, in the Exchequer, the Chief Baron is reported to have said expressly—"although the order makes a variance as to service, it makes no alteration as to venue." I would have thought a different rule from that pronounced would have followed that observation. I am reported to have concurred in the rule so pronounced; but if I did, it was in an erroneous one.

Motion refused.

(a) 2 Ir. Com. Law Rep. 159; S. C. 4 Ir. Jur. 83.

T. T. 1852.
Common Pleas.

THE KING AND QUEEN'S COLLEGE OF PHYSICIANS
 v.
 POWER.

(*Common Pleas.*)

May 24, 29.

In an action of debt for use and occupation, the venue may be changed upon the common affidavit.

OWEN showed cause against a conditional order to change the venue from the county of the city of Dublin to the county of Waterford. The action was in debt, for use and occupation, to recover the rent of certain premises situate in the county of Waterford. The declaration was filed upon the 1st of May 1852, and the venue was laid in the county of the city of Dublin. On the 8th of May 1852 the defendant obtained a conditional order to change the venue to the county of Waterford, on the common affidavit that the cause of action (if any) arose in the latter county, and not elsewhere.

Owen, for the defendant.

It has been decided in this Court that in an action of debt for use and occupation, the venue will not be changed upon the common affidavit: *Gore v. Gore* (a). In that case TORRENS, J., says:—"In assumpsit for use and occupation, you would be entitled to change the venue on the common affidavit—but it is otherwise in debt, because the sum sought is certain, and no jury is required to assess the damages." This decision has been followed in *Lord Middleton v. Murphy* (b). The case of *Pratt v. Ward* (c) is to the same effect. In that case, which came before the Court on an application to change the venue in an action of debt for rent, BURTON, J., remarks:—"If it were merely an action of debt for use and occupation, you are not entitled to change the venue on the common affidavit." He also cited *Duplessis v. Chalk* (d).

(a) Smythe's Rep. 244.

(b) 3 Ir. Jur. 9.

(c) Al. & Nap. 145.

(d) 2 Strange, 878.

Joseph O'Donnell, contra, cited *Herring v. Watts* (a), and *Earl of Orkney v. Dwyer* (b), and *Chitty's Archbold's Practice* (8th ed.), p. 1165, and stated that a rule, similar to that sought for in the present case, had been made in *Wyse v. Beresford*, in Trinity Term 1850, by the Queen's Bench, which, he admitted however, had been made without discussion.

T. T. 1852.
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Cur. ad. vult

MONAHAN, C. J., now pronounced the rule of the Court.

We are all of opinion in this case that the defendant is entitled to have the venue changed. There certainly has been an express decision of the Court, in the case of *Gore v. Gore*, which established that in such a case the venue cannot be changed upon the common affidavit: that case appears to have been decided upon a *dictum* of Mr. Justice Burton, in the case of *Pratt v. Ward*; by which it is laid down that if the action be in debt, for use and occupation, the venue cannot be changed upon the common affidavit. This *dictum* follows what was supposed to have been decided in the case of *Duplessis v. Chalk* (c). But the action in that case was not an action of debt for use and occupation, but an action of debt on a parol demise; and therefore any opinion expressed upon the present question must be considered as extra-judicial. But the exact question which is now before us came before the Court of Common Pleas in England in the case of *Hering v. Watts*; and there the Court was of opinion that, although in an action of debt upon a lease, the venue could not be changed upon the common affidavit, because the devisee may be out of the country, yet that in action for use and occupation the venue might be changed, and that there is no distinction in principle, whether the action be in form an action of debt or an action of assumpsit. This case has been followed by the Court of Exchequer in this country. We must, therefore, make absolute the conditional order; but as there has been a decision of the Court to the contrary effect, we will make it absolute without costs.

May 29.

(a) 7 M. & G. 1018; S. C. 2 D. & L. 609.

(b) 4 Ir. Jur. 52.

(c) 2 Strange, 898.

T. T. 1852.
Common Pleas.

June 5.
 Nov. 3.

HENRY v. FLANNERY.

In ejectment on the title, where judgment had been marked by default against several defendants, the Court permitted judgment as in case of a nonsuit to be entered up at the instance of other defendants who had taken defence, and against whom the plaintiff had not proceeded.

RYAN, on behalf of Daniel Flannery, a principal tenant, and certain other persons undertenants to him—all of whom had taken defence to the ejectment in this cause—moved for liberty to enter up judgment as in a case of a nonsuit. This was an ejectment on the title, grounded on notice to quit, brought to recover the lands of Ballina, situate in the county of Tipperary. The declaration in ejectment was filed on the 19th of July 1851, and included several persons; and, amongst others, the said Daniel Flannery and his undertenants. The latter entered an appearance in the usual way on the 26th of July 1851, and filed their plea, taking defence for all the lands comprised in the ejectment. The plaintiff had marked judgment by default against those defendants who had not taken defence, but had taken no further proceedings against the others.

In *Stewart v. Rogers* (a), Parke, B., said :—"The 14 G. 2, c. 17, which authorises the application to the Court for judgment as in case of a nonsuit, provides that all judgments given by virtue of that Act shall be of like force and effect as judgments upon nonsuit, as a regular nonsuit might have taken place if the plaintiff had proceeded to trial; I think the defendant is entitled to his rule."—[MONAHAN, C. J. In *Tidd's Practice*, p. 762, the practice is thus laid down :—"When there are two defendants, one of whom lets judgment go by default, the other cannot have judgment as in case of a nonsuit."—That was in cases where the defendants took joint defence.—[JACKSON, J. The form of a nonsuit is that the plaintiff shall "take nothing by his bill:" here he takes a judgment by default against those who have not taken defence.]—The form is that he "shall take nothing against A B and C D;" but where A B and C D do not take joint defence, the

(a) 7 Dowl. P. C. 185.

plaintiff might have judgment against A B, and be nonsuited as to C D. *Temple v. Hamilton & Robinson* (a) does not apply.

T. T. 1852.
Common Pleas.

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v.

FLANNERY.

MONAHAN, C. J.

Take a conditional order.

Carleton now showed cause against the conditional order, on an affidavit, which stated that on the 23rd of March 1852 a civil-bill ejectment had been brought against the said Daniel Flannery, in the name of one of the plaintiffs in this case, and a decree obtained thereon, which the deponent had delayed to execute, in consequence of an offer of compromise by the defendant.

Nov. 3.

It is settled that the plaintiff cannot be nonsuited under the statute in a case where he could not have been nonsuited at the trial: *Weller v. Goyton* (b); and it has been held that in trespass the plaintiff cannot be nonsuited if any one of the defendants suffer judgment by default.—[JACKSON, J. The distinction between that case may perhaps be, that action of trespass is conversant with only one close or denomination of land; whereas an ejectment is generally conversant with different denominations held in different interests.]—In *Sawyer v. Hodges* (c), the Court held that the rule where one of the defendants applies to enter up judgment as in case of a nonsuit—the rule should be to enter up judgment generally, and should not be confined to the person applying for it. The following authorities were also referred to: *Hanway v. Smith* (d); *White v. Doolan* (e); *Archold's Practice*, by Chitty, p. 1299.

But, secondly, we having obtained a decree against Daniel Flannery in a civil-bill ejectment, the Court will not make an order which may have the effect of disturbing that.

Ryan, contra, cited *Haddrick v. Heslop* (f).

Per Curiam.

We are of opinion that the defendants are entitled to have this

(a) Sm. & Bat. 271.

(b) 1 Burr. 359.

(c) 1 Dowl. N. S. 10.

(d) 3 T. R. 662.

(e) 3 Ir. Law Rep. 500.

(f) 12 Q. B. 267.

T. T. 1852. conditional order made absolute. The plaintiff admits, by his not
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FLANNERY. having gone to trial with these parties, he could not have recovered possession as against them ; he cannot, therefore, insist that if the case had gone to trial it would not have resulted in a nonsuit. With regard to the other ground, namely, that the plaintiff has since bringing this ejectment obtained a decree in a civil-bill ejectment, we do not think that circumstance ought to affect the rule which we should otherwise make. The cause shown must therefore be allowed.

I N D E X.

ACCOMMODATION WORKS.

See RAILWAY COMPANY, 2.

ACKNOWLEDGMENT.

See LIMITATIONS, STATUTE OF.

ACT OF PARLIAMENT.

See STATUTES.

ACCOUNT STATED.

See EVIDENCE, 10.

ACTION.

See Respective Titles.

SUSPENSION OF ACTION.

ACTION ON THE CASE.

See COMMRS. OF DRAINAGE.

SETTING ASIDE PROCEEDINGS, 1.

ADMINISTRATOR.

See STAYING PROCEEDINGS, 1.

AFFIDAVIT.

See REGISTRY OF TIMBER.

SERVICE OF PROCESS, 1.

VENUE, 4, 6.

1. The copy of an affidavit on which a motion is grounded must pursue the form directed by the 210th General Order, otherwise the motion cannot be sustained. Q. B. *Birch v. Somerville* 67
2. The filing of an affidavit in reply to such affidavit does not preclude the party taking advantage of the informality. *Ibid*
3. Judgment had been recovered in an action for libel against R. B., as the "publisher and printer" of a certain newspaper. The plaintiff in that ac-

tion moved, pursuant to 11 G. 4, and 1 W. 4, c. 73, s. 3, to put the recognizance of M. S., one of the sureties, for R. B., in suit. The affidavit on which the motion was grounded described R. B. only as "printer and publisher."—*Held*, that it should have appeared by the affidavit that R. B. was "editor, proprietor or conductor" of the said newspaper. E. *Long v. Staunton* 330

4. *Held also*, that the costs of the motion will not be allowed to a successful party who has filed affidavits unnecessary for the purpose of raising the point of law on which alone he has succeeded. *Ibid*
5. An affidavit of the execution of a memorial of an assignment of a judgment before the Mayor of Toronto in Canada, whose signature and authority to administer oaths were verified by oath before a Commissioner of this Court:—*Held*, sufficient to justify the Court in ordering the memorial to be enrolled. Q. B. *Barr v. Duffin* 633

AGENT.

See BOND.

AGREEMENT.

See AWARD.

AMENDMENT.

See PLEADING, 35.

1. A writ of summons, varying in substance from the declaration, cannot be amended under the 3rd section of the Process and Practice Act, even though the Statute of Limitations might be pleaded to a new action. E. *Taaffe v. Rutledge* 22

2. The Court will not allow a writ of summons to be amended by adding the residence of the plaintiff. Q. B. *Curry v. Johnson* 641

ANNUITY.

See INCUMBERED ESTATES.

SUGGESTION OF BREACHES, 5.

Where an annuity was granted by deed to A, during the joint lives of B and C, charged upon the lands of Black-acre, and payable by two equal portions on the 1st of May and 1st of November in each year, upon trust to pay the same to B during the joint lives of B and C, and then to C if she survived:—*Held*, that C having survived B, and died on the morning of the 1st of May, A was entitled to the entire sum due upon that day. C. P. *Robinson v. Robinson* 370

APPEAL.

See ASSISTANT BARRISTER.

CRIMINAL APPEAL.

POOR-LAW.

REGISTRY APPEAL.

APPOINTMENT.

See POOR-LAWS.

APPORTIONMENT.

See ANNUITY.

ARBITRATION.

See AWARD.

“To support the condition of an arbitration bond, the Court would transpose or reject insensible words, and construe it according to the obvious intent of the parties.” *Per* BLACKBURNE, C. J. Ex. Ch. *Greene v. Bracken* 182

ARBITRATOR.

See ARBITRATION.

ARREST.

See SETTING ASIDE PROCEEDINGS, 4.

1. An arrest under a *ca. sa.*, marked for £18. 1s. 5d., the amount of the judgment, where there was less than £10

ASSISTANT-BARRISTER.

actually *due* at the time the *ca. sa.* issued, is illegal, and the defendant will be discharged. *Lessee Shuldham v. Boles* 140

2. Such writ is void, and will be set aside (no fact being in dispute) without further application, although that formed no part of the conditional order, which was simply for the discharge of the defendant from custody. *Ibid*

ASSIGNEE.

See PLEADING, 3.

ASSIGNMENT.

See AFFIDAVIT, 5.

BANKRUPT.

COVENANT.

EJECTMENT, 5.

PLEADING, 20.

ASSISTANT-BARRISTER.

1. No action will lie against a Judge of a Court of Record for any act done by him in the exercise of his judicial functions. Ex. Ch. *Ward v. Freeman* 460
2. Where in an action on the case, brought by the defendant in a civil-bill against an Assistant-Barrister for refusing to take the affidavit of his attorney in a suit in which a decree had been made against him, and for refusing the recognizance of himself and his sureties, in order that he might prosecute an appeal, and for refusing to take his appeal, and to stop all proceedings on the decree; the plaintiff gave evidence to support this case, and further, that he had performed all the necessary preliminaries entitling him to tender this affidavit; that the civil business of the Assistant-Barrister had ceased on the day previous, and that on the day he tendered the affidavit to the Assistant-Barrister he was occupied in transacting Crown business, and that on the evening of that day, as the Assistant-Barrister was about leaving the Bench, he tendered the affidavit and appeal, and that the Assistant-Barrister refused to

receive the appeal, assigning no reason. At the close of plaintiff's case the defendant's Counsel called on the Judge to nonsuit, or direct a verdict, on the ground that the defendant, being a Judge of a Court of Record, and acting judicially, was not liable in such action. Counsel for the plaintiff insisted that the refusal to receive the appeal was not a judicial act, and required the Judge to leave the case to the jury, and to direct them to find for the plaintiff. The Judge refused to leave any question to the jury, but directed them to find for the defendant, being of opinion that the defendant, acting as a Judge of a Court of Record, was not liable to an action, and the jury found accordingly.

Held, per LEFROY, C. J., CRAMPTON, J., MOORE, J., and GREENE, B., that the Assistant-Barrister, acting as a Judge of the Court of Record, in refusing to receive the appeal, acted judicially, and was not therefore responsible in an action for such refusal. *Sed per* MONAHAN, C. J., PIGOT, C. B., TORRENS, J., and PERRIN, J., the defendant in so doing acted ministerially. *Ibid*

ASSUMPSIT.
See PLEADING.

ATTORNEY.
See WARRANT OF ATTORNEY.

ATTORNMENT.
See LANDLORD AND TENANT.

AVOWRY.
See REPLEVIN.

- AWARD.
1. Where by an agreement made between A and B, reciting that A was indebted to B in a certain amount of rent out of certain premises, and that A had claims against B for the value of the crops sown and the improvements made by him, it was agreed

that A should surrender the premises, and that his claim on account of improvements and crops should be referred to arbitrators, and the amount thereof set off against the rent. The agreement then nominated arbitrators, and then followed a clause, "that in case of any disagreement between them, they should have power to call in and choose an umpire, whose decision shall be final between them." They, having differed, called in an umpire, and he made an award directing that £278 be allowed by B to A for the value of the crops, and £482 for the improvements, A giving credit thereout for the amount of rent due by him.—*Held*, that the umpire acted within the scope of his authority, the meaning of the award being, that the final decision should be his, not that of the arbitrators, and that the award was not defective in point of finality in not ascertaining the amount of rent, that not being a subject of controversy. Ex. Ch. *Greene v. Bracken* 176

2. "To support the condition of an arbitration bond, the Court would transpose or reject insensible words, and construe it according to the obvious intent of the parties." *Per* BLACKBURN, C. J. *Ibid* 182

BANKRUPT.
See TROVER.
WARRANT OF ATTORNEY.

1. A declaration in covenant stated that by articles of agreement, dated the 21st of December 1844, and made between the plaintiff, the defendant and one G. K., which recited that G. K. was indebted to the plaintiff in £800, and that in order to secure repayment, it was agreed that the plaintiff should effect an insurance on the life of G. K., *and that G. K. should pay the premium for seven years*; the defendant covenanted with the plaintiff, his executors, administrators and assigns, to pay the premiums

as they should become due. Breach
—Non-payment.

Plea—That before the commencement of the action, and before the commission of the breaches assigned, the plaintiff became bankrupt, and that J. T. was appointed his assignee, and thereby became entitled to the supposed causes of action.

Replication—That by deed of the 17th of April 1845, made between the plaintiff and M. K. his wife of the first part, T. G. and R. B. of the second part, and R. H. of the third part, the plaintiff, in consideration of £800, assigned the said policy to R. H., his executors, &c.; that the money was still due, and that the action was brought by the plaintiff for the benefit of the representative of R. H. The deed of the 17th of April 1845 being set out upon oyer, purported to assign to R. H. several policies of insurance in different amounts, the property of the plaintiff and M. K. his wife, with all sums of money due by virtue thereof, “and all advantage to be had or derived therefrom respectively,” with a proviso, that on payment of £800, R. H. should re-assign the premises to T. G. and R. B., their executors, &c., in trust “for the plaintiff and M. K. his wife, and the survivor of them, and the executors and administrators of such survivor.” *Held*, upon demurrer, that the replication was good; that the right to sue upon the covenant in the articles of the 21st of December 1844 did not pass to the assignees under the bankruptcy of the plaintiff, but might be sued for by the plaintiff for the benefit of the parties claiming under the deed of the 17th of April 1845. C. P. *Kidd v. Loughnan* 336

2. “It is quite unnecessary to refer to any of the numerous cases which have been cited, and which clearly establish that if a *chose in action* is assigned, or sold for valuable consideration by a trader to a third person before his bankruptcy, that the right to recover such *chose in*

action does not pass to the assignees; nor to those cases which establish that though the assignment is not by way of absolute sale, but by way of mortgage, or as security for a debt, that the right to sue does not pass to the assignee in bankruptcy if the debt secured exceeds the amount of the debt or *chose in action* assigned; more particularly, as all the cases on the subject are collected and referred to in the case of *D'Arnay v. Chesneau*, the latest case on the subject, in which we think the correct rule is laid down—namely, that if at the time of the bankruptcy, and not the original assignment, the debt secured is equal to or greater than the debt assigned as a security, the right to sue does not pass to the assignees. But if, on the other hand, the debt secured is at the time of the bankruptcy less than the debt assigned, so that out of the debt assigned, if received, the assignee would be entitled to retain any part of the sum received, for the benefit of the creditors, that in such case the right to sue passes to the assignees in bankruptcy, notwithstanding the assignment.” *Per* MONAHAN, C. J. *Ibid* 346

3. The sureties in a bond under the Bankrupt Act may render their principal at any time before judgment. Q. B. *Ferguson v. Jackson* 579

BARRISTER.

See ASSISTANT-BARRISTER.

BILL OF EXCEPTIONS.

An exception cannot be taken, founded on a new case not opened until after the cases of both plaintiff and defendant have closed. E. *Clooney v. Watson* 129

BILL OF PARTICULARS.

A bill of particulars ought to be something more than a mere echo of the declaration, and should state specifically the dates and items of the demand. Q. B. *Birch v. Somerville* 67

BOND.

BOND.

See EVIDENCE, 1.
PLEADING, 1.
POOR-LAWS, 4.
STAMP DUTY.
SUGGESTION OF BREACHES.
WARRANT OF ATTORNEY.

BREACHES.

See SUGGESTION OF BREACHES.

BURGESS.

See REGISTRY APPEAL.

BYE-LAWS.

See CORPORATION.
DISPENSARY.
HOSPITAL.

CAPIAS AD SATISFACIENDUM.

See ARREST.
SHERIFF.

CASE.

See ACTION ON THE CASE.

CHANCERY.

See SCIRE FACIAS.

CHANCERY REGULATION ACT.

Where an action is brought against an administrator, and pending that action a cause petition is filed to administer the assets of the deceased, the Court, under the provisions of the Chancery Regulation Act, stayed the proceedings; but in such case the costs of the proceedings at law will not be allowed. Q. B. *Moriarty v. Moriarty* 226

CHARITABLE INSTITUTION.

See CORPORATION.
DISPENSARY.
HOSPITAL.

CHOSE IN ACTION.

See BANKRUPT.

CIVIL-BILL.

1. A permanent lodger, who has no other fixed place of residence, is a resident

COMMISSIONERS, &c. 657

within the meaning of the 14 & 15 Vic., c. 57 (the Civil-Bill Act), in the county or city in which such lodgings are situate. C. P. *Snow v. Irwin* 378

2. "The ground of action in the present case is the refusal to receive an appeal from a civil-bill decree pronounced by the Assistant-Barrister, the consequence of which was the issuing of the decree and the seizure of the plaintiff's goods thereunder. Now, it cannot be contended that the right to have an appeal received is an absolute right; it is only conditional, founded on the performance of certain requisites pointed out by the statute which gives the appeal; amongst others, the making of an affidavit that the appeal is not intended for delay." *Per* GREENE, B. Ex. Ch. *Ward v. Freeman* 469

3. A defendant having a country residence, but occupying lodgings in Dublin at the commencement of the action, is not resident at the latter place, within the meaning of the 14 & 15 Vic., c. 57. C. P. *Forest v. Maher* 546

COMMISSION.

See WITNESS.

COMMISSIONERS.

See AFFIDAVIT.
POOR-LAW, 1.

COMMISSIONERS OF DRAINAGE

Case, by a mill-owner against the Commissioners of Drainage in Ireland. The declaration contained five counts. The first three counts averred that the Commissioners wrongfully and injuriously deepened the bed of the plaintiff's mill stream, removed weirs, sluices and dams, and cut channels above the mill, and thereby lessened the working water-power of the mill. The fourth and fifth counts averred that the Commissioners deepened the stream, &c., pursuant to certain Acts of Parliament, but were guilty of neglect of duty in the manner in which they prosecuted the works; also that

APPENDICES

The first of these is the fact that the
 Government has been unable to secure
 a sufficient number of troops to
 maintain its position in the
 North. This is due to the fact
 that the Government has been unable
 to secure the necessary funds to
 maintain its army. The second
 fact is that the Government has
 been unable to secure the necessary
 supplies for its army. This is
 due to the fact that the
 Government has been unable to
 secure the necessary funds to
 maintain its army. The third
 fact is that the Government has
 been unable to secure the necessary
 supplies for its army. This is
 due to the fact that the
 Government has been unable to
 secure the necessary funds to
 maintain its army.

1. Field Work : The first part of the work is the field work. The student is required to visit the various places of interest in the city and to collect the necessary data. The student is also required to observe the various activities of the city and to record the same. The student is also required to observe the various activities of the city and to record the same.

4. *Staphylococcus aureus* - This is the most common cause of skin infections. It is a gram-positive, spherical bacterium that can form clusters. It is often found on the skin and in the nose. It can cause a variety of infections, including abscesses, boils, and cellulitis.

[illegible]

COMMON LAW.

2/10/1961

APPENDIX F

DISCUSSION

SECRET

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SECRET **CONFIDENTIAL**

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THE UNIVERSITY OF CHICAGO

SECRET

THE COURT IN THE CASE OF THE UNITED STATES V. GORMAN, 100 U.S. 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 9

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DISCUSSION

IN LANCASHIRE SHERIFF OF.

CONSIDERATION OF ACTIONS.

... Actions on policies of insurance
against fire being brought against two
Companies, A. and W. E., a consoli-
dated order was made, whereby the
plaintiff was to proceed alone with his
action against the A. Company, and
be at liberty therein to prove his loss
as fully as he could in the two actions.
The plaintiff gave the consolidation
order in evidence, and proved his en-
tire loss, so far as he had legal
evidence. There was a verdict for
him, the amount of which, and the
costs, were paid by the hands of the
A. Company, but the W. E. Company
contributed its share. On the motion
of the plaintiff, a conditional order
was made for liberty to the plaintiff
to proceed on certain terms with the
action against the W. E. Company.

Subsequent to that, the Act of the 14 & 15 Vic., c. 99, came into operation, which made parties eligible as witnesses; the plaintiff could consequently be examined, and make evidence of a certain stock-book, the rejection of which at a former trial might, in the opinion of the learned Judge who tried the case, have caused injustice to have been done.

Held (LEFROY, B., *dissentiente*), on motion to show cause, that the conditional order should be made absolute, as the plaintiff had been supplied with new evidence, and it appeared that injustice might have been done to the plaintiff in the first action. E. *M'Evoy v. The West of England Insurance Company* 183

2. *Held also*, that a consolidation order is not absolutely binding. *Ibid*

3. Where three separate actions were brought under the 9 & 10 Vic., c. 93 (Lord Campbell's Act), by different plaintiffs against the same defendant, the Court refused a rule to consolidate the actions, or to stay the proceedings in two of them to abide the result of the third. C. P. *Henderson v. Leicester* 219

4. *Seemle*, the object of the third section of the above statute was, to prohibit different actions being brought in respect of the same casualty *to the same person*; not to prohibit the representatives of each person from maintaining a separate action. *Ibid*

5. Where several suits grounded on the same cause of action were brought against the same defendant, the Court refused to consolidate the actions, but compelled the plaintiffs to select one, and ordered the others to abide the event of that suit. Q. B. *Nerheney v. The Guardians of the Roscommon Union* 228

CONSPIRACY.
See CRIMINAL LAW.

CONTRACT.

See PLEADING.

CONVEYANCE.

See FRAUDULENT CONVEYANCE.
PLEADING, 3.

CONVICTION.

See CRIMINAL LAW.

COPY.

See AFFIDAVIT.
PLEADING, 32.

In granting *oyer* under the 89th General Order, it is not sufficient to furnish certified copies of the documents merely. If the opposite party require to compare them with the originals, he should be permitted to do so. C. P. *Longfield v. Young* 222

Seemle.—If the opposite party do not require to compare the copies furnished with the originals, *oyer* will be complete on delivery of certified copies. *Ibid*

CORPORATION.

See POOR-LAWS.

1. Where an hospital, supported by a voluntary subscription, was recognised by a public Act, which Act directed certain sums to be paid out of the public money for purposes therein specified: *Held*, that such hospital was not thereby constituted a corporation within the meaning of 5 & 6 G. 3, c. 20. Q. B. *Regina v. Governors of St. John's Hospital* 386

2. *Held also*, that the governing body of such hospital may enact a bye-law by virtue of which the members may vote by proxy in the election of medical officers. *Ibid*

3. *Quære*.—Would such bye-law be valid in the case of a corporation? *Ibid*

4. "To create a corporation by implication, the implication must be a necessary one, and such as is absolutely essential to the duties to be performed."—*Per LEFROY, C. J.* *Ibid*

COSTS.

See AFFIDAVIT, 3.

CIVIL BILL.

CHANCERY REGULATION ACT.

CONSENT FOR JUDGMENT.

REFPLEVIN.

SECURITY FOR COSTS.

SHERIFF.

STAYING PROCEEDINGS.

COUNSEL.

"If there be two Counsel engaged in a Registry Appeal, the Junior should go on; but as no rule has been established as to the practice in hearing Registry Appeals, we will not consider it essential that two Counsel should be employed. Doubtless, if the Exchequer Chamber practice be followed, the Junior has the right; unless he waive that right he is entitled to proceed." *Per MONAHAN, C.J.*
Ex. Ch. Reilly's case 561

COVENANT.

See ANNUITY.

BANKRUPT.

PLEADING, 3, 20.

1. A, in 1792, by indentures of lease and re-lease, conveyed certain premises for three lives to B, at the yearly rent of £40. This indenture contained a covenant by A for himself, his heirs, executors, administrators and assigns, with B, that upon the death of any of the lives, he A would add and insert to the time and term thereby granted the life of such person as might be named, which nominated life was to be indorsed on the indenture, or written on a deed, label or parchment, to be affixed to the indenture, or in a separate deed or writing, declaring the life or lives failing, and the life and lives so to be added in lieu thereof; and also a covenant by B for himself, his heirs, executors, administrators and assigns, to pay the rent. By indenture of 1818, reciting that the interest of A in said premises was then vested in C, and that of B in D, and that one of the lives in the original lease was dead, and that D had

applied to C to execute a renewal by the insertion of a new life, to which C had agreed; it was witnessed that in pursuance of the covenant for renewal in said lease contained, C had added and inserted a new life to the term of said lease, *Habendum*, for said life, &c., *subject to the yearly rent of £40, and to all and singular the covenants and agreements in said indenture contained*. D assigned over to a third party in 1845.

Held, in an action of covenant against D, for the non-payment of rent accruing due after the assignment of 1845, that D did not thereby discharge himself of his liability under the renewal of 1818, the words, "subject to the rent and covenants," creating an express covenant, and such appearing on the face of the deed to be the intention of the parties.—[CRAMPTON, J., *dis-sentiente*]. *Ex. Ch. McCreery v. Luttrell* 289

2. A, being owner in fee, demised certain lands to B, reserving out of the demise, *inter alia* "all timber and other trees, both above and under ground;" and the indenture contained a covenant by B that he would "uphold, sustain and keep all the houses, &c., *plantation of trees*, and other improvements whatsoever, that now are, or at any time hereafter during the said demise shall be, built or made, &c."

Held, that notwithstanding such covenant, the lessee had a property in the trees planted by him during the term, if such were registered, pursuant to the 23 & 24 G. 3, c. 39. *Q.B. Mountcassell v. O'Neill* 436

CRIMINAL APPEAL.

See CRIMINAL LAW.

POOR-LAW.

The Court of Criminal Appeal can only deal with questions of law arising out of the facts stated. *Cr. Ap. The Queen v. Higgins* 213

CRIMINAL LAW.

See POOR-LAW.

1. A prisoner was indicted under 14 & 15 Vic., c. 19, s. 1, for being found at night armed with a dangerous and offensive instrument, to wit a stone, with intent to break and enter a dwelling-house, and commit a felony therein. The evidence was that when the prisoner was arrested, he was beating the door of the dwelling-house with a large stone; and the jury were directed to convict the prisoner if they believed he had the stone in his possession with the intent of effecting a felonious entry into the house, and the prisoner was convicted. *Held*, that the Judge was not justified in assuming that the stone was an offensive weapon within the meaning of the statute, but should have left that question to the jury. Cr. Ap. *The Queen v. Burke* 210

2. *Held also*, that evidence should have been given of a felonious intent, to justify a conviction under this statute. *Ibid*

3. Traversers were indicted and convicted for rescuing goods and cattle distrained for poor-rates. In the rate-book and warrant the occupier was described as "J. Westropp;" and evidence was given that J. Westropp had died previous to the issuing of the warrant, though living at the time the rate was struck.

Held, that such conviction was right, the occupier being sufficiently described by the initial letter of his Christian-name, and the rate being leviable, notwithstanding the death of the occupier; under 6 & 7 Vic., c. 92, the rateable hereditaments were still liable. Cr. Ap. *The Queen v. Westropp & Hurley* 217

4. A prisoner was charged on an indictment that he and two others conspired with each other, and others unknown, to murder J. T. The three prisoners were in custody and arraigned, and severally pleaded not guilty; but refusing to join in their challenges, one was put on his trial, and the evidence

affected him and the other two named in the indictment: there was no evidence to show that any other person was engaged in the conspiracy. *Held*, that it was not necessary that the other two prisoners should have been tried with him, though they were amenable to justice, because, being found guilty by an unexceptionable verdict, judgment must follow. Cr. Ap. *The Queen v. Ahearne* 381

DEBT.

See PLEADING.

DECLARATION.

See PLEADING.

DEED.

See CONVEYANCE.

COVENANT.

PLEADING.

DEFEASANCE.

See WARRANT OF ATTORNEY.

DEMURRER.

See PLEADING.

DEVISE.

See WILL.

DICTA.

"In general there is no more dangerous ground for a judgment than *dicta* taken from any case, however high the authority, without adverting to the nature and particulars of the case, the very point the Court had to decide, and the facts on which it was decided." *Per* LEFROY, C. J. Ex. Ch. *Ward v. Freeman* 532

DISPENSARY.

A subscriber to a dispensary, being a married woman, whose subscription thereto was paid out of her own moneys, may vote for the appointment of medical officer by her husband as her proxy. Q. B. *The Queen v. Campbell* 391

DISTRESS.

DISTRESS.

See EJECTMENT, 9.

PLEADING, 2.

REPLEVIN.

1. Where the notice of distress is defective under 9 & 10 Vic., c. 111, and the tenant replevies, the landlord may treat this as an election by the tenant to avoid the distress, and may distrain a second time. E. *Clooney v. Watson* 129
2. Where the plaintiff, after the service of the writ of summons in ejectment for non-payment of rent, distrained for rent which subsequently became due; and by the notice of distress stated that such distress was made without prejudice to the year's rent due on the 25th of March, and for which ejectment proceedings were then pending:—Held, that such distress did not operate as a waiver of the ejectment. C. P. *Bailey v. Mason* 582

DRAINAGE.

See COMMISSIONERS OF DRAINAGE.

EJECTMENT.

See JUDGMENT AS IN CASE OF A NONSUIT, 3.

1. Three denominations of land were demised by Sir J. P. by a lease of 1803, at a rent of £227, for three lives, to the defendant. After the execution of this lease, a lease was executed by the defendant, of one of the denominations, to a trustee for the lessor, at a rent of £147, but the trustee executed no deed transferring the legal estate; the rents were paid by the sub-tenants to Sir J. P. the lessor, and the plaintiff allowed credit to the original lessee and his representatives for the rent reserved under the derivative lease. In an ejectment for non-payment of rent, brought by the heir-at-law of Sir J. P. against the representatives of the defendant, Held, that such was maintainable, as the plaintiff's possession was solely referrible to his trustee, he himself

EJECTMENT.

not having the legal estate in the lands. Q. B. *Purcell v. Nash* 48

2. A tenant from year to year died, leaving a widow and an only son, an infant; the widow remained in possession, and subsequently married; her second husband obtained a lease of the premises so held by the deceased, for a term of seven years, during the minority of the infant. Held, on the expiration of that term, the landlord was entitled to maintain an ejectment without serving a notice to quit. Q. B. *Armstrong v. Loughnane* 72
3. By the terms of a lease, a right to re-enter upon the lands demised was reserved to the lessor, in case any half-yearly gale of the reserved rent, or any part thereof, should be in arrear for twenty-one days after any of the periods appointed for payment. At the time when the ejectment was brought, one half-year's rent, and also fractions of previous gales, making, with the former, a full year's rent in amount, as reserved by the lease, were due. Held, under those circumstances, that an ejectment for non-payment of rent under the statutes 4 G. 1, c. 5, and 8 G. 1, c. 2, was maintainable; that it was not necessary that the right of re-entry should be co-extensive with the rent due, or that the arrear of rent required by the statute should have accrued in a continuous period previous to the commencement of the action; and that as the plaintiff was, under the lease, entitled to re-enter for any half-yearly gale, and a sum equal to one year's rent, as reserved by the lease, was due to him, he was entitled to recover possession. C. P. *Chester v. Beary* 120
4. In Hilary 1806, A, being under a settlement made in 1769 tenant for life of thirteen denominations of land, with remainder to B in tail male, remainder to N. in tail male, A and B joined in a recovery; and by deed of the 9th of March 1806, executed by A, B and R., it was declared that the recovery was to be to the use of B and his

heirs, but that he was forthwith to execute to R. a mortgage in fee of some of the lands in the recovery, to secure a debt due from A to R.; and by deed of mortgage of the same date, A and B conveyed (by lease and re-lease) seven of the thirteen denominations to R. in fee, subject to redemption, &c. B died in January 1809 without issue, leaving N. (the next remainderman under the settlement of 1769) his heir-at-law. A died in 1816. N., *having been in possession from the death of A in 1816*, died in 1848, leaving the lessor of the plaintiff his eldest son, who claimed all the lands as heir in tail under the remainder to N. in the settlement of 1769. In 1810 N., by settlement on his marriage, after reciting (as if the recovery of 1806 had been in fact duly suffered) the declaration made by the first deed of the 9th of March 1806, of the uses of the recovery thereby recited to have been duly suffered, and without any further recital relating to the title, conveyed (by lease and re-lease) all the lands comprised in the deed, declaring the uses of the recovery, including those in the mortgage, to R., to the use of himself for life, remainder to his first and other sons in tail male. N. never levied a fine or suffered a recovery. The recovery of 1806 had, down to the passing of the Act for the Abolition of Fines and Recoveries (4 & 5 W. 4, c. 92), been invalid as to some of the denominations in the mortgage to R., because, though named in the deed making the tenant to the præcipe, they were not named in the recovery itself; and as to others of the mortgaged denominations, because the tenant to the præcipe was not made by C, in whom the legal freehold was outstanding, under a deed of 1799, whereby A's life estate in such of the lands as were comprised in that deed was assigned to C and his heirs, in trust to make certain annual and other payments out of the rents, and to pay any surplus to A. *Held*, that at the time of the passing of the

Act (August 1834), N., *from having executed the settlement of 1810*, was not in possession of the lands "*in respect of any estate which the recovery, if valid, would have barred*," within the meaning of those words in the 9th section of the Act; and that therefore the above defects in the recovery were cured by the 5th and 6th sections; and the lessor of the plaintiff was not entitled to recover the lands in the mortgage to R. Q.B. *Davies v. Darcy* 163

5. By a lease made between R. J. B. and the defendant, R. J. B., "*with the consent of R. J., mortgagee of the said premises, testified by his being a party thereto*," demised to the defendant certain premises in the city of Dublin for eighty-three years, at the yearly rent of £36. The rent was reserved to, and the covenants made with, R. J. B., his executors, administrators and assigns, and the lease contained a proviso enabling R. J. B., his executors, administrators and assigns, to re-enter in default of payment of the rent for twenty-one days. R. J. was not named as a party to the lease, but it was signed, though not sealed, by him, and bore the following indorsement signed by him: "I have signed the within deed as mortgagee under the deed of mortgage, dated the 6th of August 1828, and I do hereby consent that the within-named lessees shall hold the premises within mentioned, subject only to the payment of the rent reserved, so far as regards the within mortgage." The titles of R. J. B. and R. J. having become vested in the plaintiff, who brought an ejectment for non-payment of rent:—*Held*, that it could not be maintained under the circumstances; that as assignee of R. J. B., the plaintiff could not maintain it, inasmuch as in that character he was not entitled to re-enter, and as assignee of R. J., he was not entitled to the rent. C. P. *Morrison v. M'Anaspie* 366

6. *Seemle*.—The above indorsement was

not a sufficient article, minute or contract in writing, within the 25 G. 2, c. 13. C. P. *Morrison v. M^{rs} Anaspie*

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7. An ejectment on the title was brought by an owner in fee against a lessee, who had held certain lands, *pur auter vie*, which he had sublet to undertenants from year to year. On the determination of the life, it appeared that some of the undertenants had cropped the lands—others had not; and at the time of bringing the ejectment, the current year of the undertenancy had not expired. The undertenants suffered judgment by default; and the tenant *pur auter vie* not being in occupation, having taken defence generally, relied on the 14 & 15 Vic., c. 25, giving the tenants an extended term until the expiration of the current year of their tenancy, if the tenancy determine by death or ceaser of the estate of a landlord entitled for life. *Held*, that the tenant *pur auter vie* had no right to set up that defence, as he had no claim to emblements; and the undertenants, having suffered judgment to go by default, had thereby ended their title, and therefore that the owner of the land was entitled to recover possession.—[*PERRIN, J., dubitante.*] *Q. B. Stradbroke v. Mulcahy* 406
8. *Quere*.—Whether 14 & 15 Vic. c. 25, applies to tenants not entitled to emblements? *Ibid*
9. Where the plaintiff, after the service of the writ of summons in ejectment for non-payment of rent, distrained for rent which subsequently became due; and by the notice of distress stated that such distress was made without prejudice to the year's rent due on the 25th of March, and for which ejectment proceedings were then pending:—*Held*, that such distress did not operate as a waiver of the ejectment. C. P. *Bailey v. Mason* 582
10. "It has been argued that the landlord, by bringing the present

ejectment, treated the tenant as a trespasser, and that as the statute of the 11 Anne, c. 2, enacts that the summons in ejectment shall stand in the place and stead of the demand and re-entry at Common Law, the lease was determined by the service of the ejectment, and the tenant accordingly became a trespasser at all events from that time. We do not think this is the true construction of the statute, in directing the summons to stand in the place and stead of the demand and re-entry. We do not think it was intended to be so, generally and for all purposes, but merely to enable the plaintiff to sustain the ejectment, and to operate at the trial as proof of demand and re-entry; but that in the meantime, and until the trial, and the execution of the *habere*, the relation of landlord and tenant continues to subsist between the parties. If the landlord, before the trial, entered and expelled the tenant, he would be a trespasser by that Act, which he could not be if the lease were then determined. The 2nd section of the 5 G. 2, c. 4, seems to us to support the same view." *Per MONAHAN, C. J.*
Ibid 588

EMBLEMETS.

See EJECTMENT, 7.

ENLARGEMENT.

See PLEADING, 4.

ENROLMENT.

See AFFIDAVIT, 5.

ESTATE.

See COVENANT.
PLEADING.
WILL.

ESTATE TAIL.

See WILL.

ESTOPPEL.

See PLEADING, 22, 23.

EVIDENCE.

EVIDENCE.

See CONSOLIDATION OF ACTIONS.
CRIMINAL LAW.

PLEADING.

POOR-LAW.

STAMP DUTY.

LIMITATIONS, STATUTE OF.

1. *Semble*.—On a writ of inquiry on a suggestion of breaches, the bond may be objected to for want of a stamp. Q. B. *Marratt v. O'Connor* 70
2. Where in a rate-book, under the Poor-law Acts, the rated person was under the head "Occupiers" described as representatives of T. K., *Held*, that such description was *prima facie* good; and any objection to the rating could only be taken advantage of by appeal from the rate. Cr. Ap. *The Queen v. Higgins* 213
3. A Peer having been examined and cross-examined on a trial, without being sworn, and no objection being then made to the reception of his evidence:—*Held*, that it was too late to object to his testimony on motion for a new trial. Q. B. *Birch v. Somerville* 243
4. A statement made by a plaintiff subsequent to a trial is admissible in evidence on motion for a new trial, as being a declaration on the subject-matter of the motion. *Ibid*
5. Assumpsit, on a promissory note. Plea—general issue. The defence at the trial was—first, that certain costs due to the defendant were by deed assigned by him to the plaintiff as a security for the debt, and thereby on the face of the deed, although there were no express words to that effect, the right of action was suspended by operation of law until the security given by the deed had failed. Secondly, that prior to the execution of the deed, and on the faith of which it was executed, a parol agreement was entered into that all proceedings on foot of the promissory note should be suspended until the security given by the deed had failed.

EVIDENCE.

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Held, First—that the right of action was not suspended by operation of law. E. *Mostyn v. Duffy* 319

6. Secondly—That, assuming the parol agreement to be admissible in evidence, it would not suspend the right of action. *Ibid*
7. Where, in an action on the case, brought by the defendant in a civil-bill, against an Assistant-Barrister, for refusing to take the affidavit of his attorney in a suit in which a decree had been made against him, and for refusing the recognizance of himself and his sureties, in order that he might prosecute an appeal, and for refusing to take his appeal, and to stop all proceedings on the decree; the plaintiff gave evidence to support this case, and further, that he had performed all the necessary preliminaries entitling him to tender this affidavit; that the civil business of the Assistant-Barrister had ceased on the day previous, and that on the day he tendered the affidavit to the Assistant-Barrister, he was occupied in transacting Crown business, and that on the evening of that day, as the Assistant-Barrister was about leaving the Bench, he tendered the affidavit and appeal, and that the Assistant-Barrister refused to receive the appeal, assigning no reason. At the close of plaintiff's case, the defendant's Counsel called on the Judge to nonsuit, or direct a verdict, on the ground that the defendant, being a Judge of a Court of Record, and acting judicially, was not liable in such action. Counsel for the plaintiff insisted that the refusal to receive the appeal was not a judicial act, and required the Judge to leave the case to the jury, and to direct them to find for the plaintiff. The Judge refused to leave any question to the jury, but directed them to find for the defendant, being of opinion that the defendant, acting as a Judge of a Court of Record, was not liable to an action, and the jury found accordingly.

Held, that this was a mistrial, and that a *venire de novo* should be awarded: evidence having been gone into by the plaintiff, proving all the averments in his declaration, the Judge was bound to leave the case to the jury, although he was of opinion no cause of action was disclosed in the declaration.—[LEFROY, C. J., MOORE, J., and GREENE, B., *dissentientibus*.] Ex. Ch. *Ward v. Freeman* 460

8. In an action on the case, against a Sheriff, for a false return of *non est inventus*, the measure of damages is the actual value of the custody to the plaintiff, and it lies on the plaintiff to give some evidence from which the jury may calculate that value, independently of the amount in the writ. E. *Cahill v. Verner* 549

9. Where the jury have found their verdict on a wrong principle, the Court will set it aside and direct a new trial. *Ibid*

10. Assumpsit, on an account stated and settled.—*Held*, an I. O. U. not sufficient evidence to sustain the count, where it appears it was extorted from the defendant, or given under circumstances that negative the admission of a debt. E. *Croker v. Walsh* 552

EXCEPTIONS.

See BILL OF EXCEPTIONS.

EXCESS.

See COMMISSIONERS.
JURISDICTION.

EXECUTION.

See SUGGESTION OF BREACHES.

EXECUTOR.

Where the plaintiff, an executor, had, after the decease of the testator, made a parol letting to the defendant of a house and premises, part of the testator's assets;—*Held*, that the action for use and occupation was properly brought by the plaintiff in his repre-

FRAUDULENT, &c.

sentative capacity. C. P. *M'Auley v. Dalton* 542

FEE-FARM GRANT.

See REPLEVIN.

FELONY.

See CRIMINAL LAW.

FEME COVERT.

A subscriber to a dispensary, being a married woman, whose subscription thereto was paid out of her own moneys, may vote for the appointment of medical officer by her husband as her proxy. Q. B. *The Queen v. Campbell* 391

FIERI FACIAS.

See SHERIFF.

SUGGESTION OF BREACHES.

FINES AND RECOVERY.

See EJECTMENT, 4.

FRANCHISE.

See REGISTRY APPEALS.

FRAUDULENT CONVEYANCE.

Baron and feme, by indenture, dated the 19th of June 1830, conveyed fee-simple estates vested in the wife to the use of the husband for life, remainder to the wife for life, remainder to their children in such shares and proportions as the husband and wife should appoint, and in default of appointment, share and share alike. The deed reserved a power to the husband and wife to appoint the said lands for any term of years to any person for any sum of money not exceeding £2000, or to charge and incumber the same, and the estates thereby limited, with the payment of any sum not exceeding £2000, for the use and benefit of the husband; and it was thereby also agreed that it might be lawful for the husband and wife, by any deed, under their hands and seals, to make any lease or leases of all or any part of the lands for any term or number of years, or for any term of one, two

FREEMAN.

or three lives, with or without covenant for perpetual renewal. After the execution of this deed, the husband and wife, by indenture of the 23rd of June 1838, in consideration of £1100, granted a portion of these lands to the plaintiff, describing him as the mortgagor of the lands, for a term of three lives and thirty-one years in reversion after the expiration of twenty-eight years unexpired, and for such other lives as should be added in pursuance of a covenant for perpetual renewal, at the yearly rent of £277, payable at the determination of the twenty-eight years. This lease contained the usual power of distress and re-entry, a covenant for payment of the rent, and a covenant for perpetual renewal on payment of one shilling as a renewal fine.

Held, that as against the plaintiffs claiming under this lease of 1838, the limitations in favour of the children in the deed of 1830 were not fraudulent and void within the meaning of 10 *Car.* 1, sess. 2, c. 3. Q. B. *Greene v. O'Kearney* 267

FREEMAN.

See *REGISTRY APPEAL*.

GENERAL ORDERS.

See *AFFIDAVIT*.

JUDGMENT AS IN CASE OF A
NONSUIT.

SCIRE FACIAS.

SERVICE OF PROCESS.

SETTING ASIDE PROCEEDINGS.
OYER.

VENUE.

GRAND JURY.

Where, on an application to a grand jury for compensation for malicious injury, the grand jury are not satisfied that the injury was malicious, the applicant is entitled to apply to this Court for an issue to try the fact. Q. B. *In re Thompson* 404

GRANT.

See *FEE-FARM GRANT*.
REPLEVIN.

INTERPLEADER.

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GROWING CROPS.

See *SHERIFF*, 3.

HUSBAND AND WIFE.

See *FEME COVERT*.

HOSPITAL.

Where an hospital, supported by a voluntary subscription, was recognised by a public Act, which directed certain sums to be paid out of the public money for purposes therein specified:—*Held*, that such hospital was not thereby constituted a corporation within the meaning of the 5 & 6 *G.* 3, c. 20. Q. B. *The Queen v. Governors of St. John's Hospital* 386

Held also, that the governing body of such hospital may enact a bye-law by virtue of which the members may vote by proxy in the election of medical officers. *Ibid*

INCUMBERED ESTATES.

The Court for the Sale of Incumbered Estates in Ireland have not jurisdiction, under the 12 & 13 *Vic.*, c. 77, s. 16, to sell a perpetual annuity, granted by a lessee holding for lives renewable for ever. C. P. *In re Massy* 32

INFANT.

See *EJECTMENT*, 2.

INITIALS.

See *CRIMINAL LAWS*, 3.
POOR-LAWS, 6.

INSOLVENT.

See *SECURITY FOR COSTS*.

WARRANT OF ATTORNEY.

INSURANCE.

See *POLICY OF INSURANCE*.

INTERPLEADER.

See *SHERIFF*.

The Court will not grant an interpleader rule under the 9 & 10 *Vic.*, c. 64, at the instance of a Railway Company, with whom goods have been deposited, on the ground that a

third party asserts a title to the goods, adverse and paramount to the bailor. C. P. *Scott v. Great Midland Railway Company* 83

I. O. U.

See EVIDENCE.

IRREGULARITY.

See AFFIDAVIT, 2.

PLEADING.

SETTING ASIDE PROCEEDINGS.

ISSUE.

See WILL.

JOINTURE.

See WILL.

JUDGE.

See ASSISTANT-BARRISTER.

No action will lie against a Judge of a Court of Record for any act done by him in the exercise of his judicial functions. Ex. Ch. *Ward v. Freeman* 460

“There is another principle applicable to this case, which is, that if any portion of the thing complained of partake of the nature of a judicial act, it will bring the matter within the protection of the rule, even though other matters may be connected with it which would not be strictly judicial.” Per GREENE, B. *Ibid.* 471

JUDGMENT.

See AFFIDAVIT.

BANKRUPT.

CONSENT FOR JUDGMENT.

SCIRE FACIAS.

WARRANT OF ATTORNEY.

Where any portion of a debt remains due, the officer should enter judgment without any order of the Court for the purpose. E. *Anonymous* 108

JUDGMENT BY DEFAULT.

See EJECTMENT, 7.

JUDGMENT AS IN CASE OF A NONSUIT.

JURISDICTION.

JUDGMENT AS IN CASE OF A NONSUIT.

1. In notice of motion to show cause against a conditional order for judgment as in case of a nonsuit, it is sufficient compliance with the 114th and 239th New General Rules to describe the affidavit and other documents upon which the motion is grounded, without specifying the particular grounds. E. *Williams v. Humphreys* 107
2. A plaintiff not being prepared to go to trial pursuant to his peremptory undertaking, in consequence of the absence of a material witness, applied to the Judge at Nisi Prius for, and obtained, a postponement until the Sittings of the Consolidated Nisi Prius Court in the next Term. The plaintiff did not proceed to trial until the Sittings after the next Term, when the defendant objected to the case being proceeded with, as he was entitled to judgment absolute as in case of nonsuit. The Judge having allowed the case to go on, the defendant disappeared, and there was a verdict for the plaintiff. On motion to set aside the verdict, and for judgment as on a nonsuit:—*Held*, the verdict should be set aside; and that plaintiff, in not going to trial in Term, or having applied to enlarge the time, was guilty of neglect within the statute 28 G. 3, c. 31, s. 2. No rule on the other part of the motion. E. *Garvey v. Scott* 197
3. In ejectment on the title, where judgment had been marked by default against several defendants, the Court permitted judgment as in case of a nonsuit to be entered up at the instance of other defendants who had taken defence, and against whom the plaintiff had not proceeded. C. P. *Henry v. Flannery* 650

JURISDICTION.

See ASSISTANT-BARRISTER.

COMMISSIONERS.

INCUMBERED ESTATES.

The Court of Criminal Appeal has only jurisdiction to deal with questions of law arising out of the facts stated. Cr. Ap. *The Queen v. Higgins* 213

JUSTICE OF THE PEACE.
See RAILWAY.

JUSTIFICATION.
See PLEADING, 17.

LACHES.
See JUDGMENT AS IN CASE OF A NONSUIT.

LANDLORD AND TENANT.
See COVENANT.
EJECTMENT.
PLEADING.
REGISTRY OF TIMBER.
SHERIFF.

"By force of the statute 4 & 5 Anne, c. 16, the assignment is complete on the execution of the conveyance, and carries with it an immediate right to the incidents of the reversion. Then, in order to protect the tenant who should have had no notice of the assignment, the 10th section provides that the tenant who has paid rent to the person whom he considered to be still his landlord shall be protected against the demand of the assignee, who had not given him notice of the assignment of the reversion to himself. The latter clause effects no more than this. The object of the statute is twofold; first, to entitle the assignee to the reversion without attornment; and secondly, to protect the tenant. It had no other effect; and the tenant will always be safe in paying rent to his lessor, before notice of the assignment, if he demand it."—*Per* PENNEFATHER, B. E. *Conran v. Pedder* 207

LEASE.
See INCUMBERED ESTATES.

LEGACY.
See STAMP.

LIBEL.
See AFFIDAVIT.
COSTS.

LIMITATIONS, STATUTE OF.

See AMENDMENT, 1.
PLEADING, 32.
SERVICE OF PROCESS, 3.
SETTING ASIDE PROCEEDINGS, 2.

Assumpsit, on an account stated between the plaintiff and R. H. E., deceased.—Plea, non-assumpsit and the Statute of Limitations. At the trial a special verdict was taken, in which the following (amongst other) facts were found: That three accounts were stated and settled in February 1825 by and between the plaintiff and the said R. H. E. That on the 20th of February 1828 R. H. E. wrote a letter to the plaintiff, in which was contained these passages:—"Should I receive the mortgage of Mr. L., I shall be able to settle with you." "You may be assured that I am anxious that our accounts should be arranged as soon as possible; nothing delays it but my having the means, which the Barna business, if settled, would enable me to do." That the amount of the Barna mortgage debt was paid to R. H. E. in November 1835, and the action was admitted to have been brought within six years from November 1835:—*Held*, that there was a sufficient promise to pay contained in the letter. *E. Maunsell v. Hedges* 88

2. *Held also*, that such a promise does not require a new consideration to support it, whether the contingency happen within or after six years from the date of the promise. *Ibid*
3. *Held also*, that the statute began to run from the period at which the contingency happened. *Ibid*

LODGER.
See CIVIL BILL.
COSTS.

MAGISTRATE.
See JUSTICE OF THE PEACE.

MALICIOUS INJURY.
See GRAND JURY.

MANDAMUS.**MANDAMUS.***See* CORPORATION.

RAILWAY COMPANY.

MEMORANDUM.

In the Vacation after Hilary Term The Right Hon. FRANCIS BLACKBURNE was appointed Lord Chancellor, and The Right Hon. THOMAS LEFROY, then Baron of the Exchequer, was appointed his successor in the Court of Queen's Bench, and took his seat on the 14th of April 1852. The Right Honorable RICHARD WILSON GREENE was appointed Baron of the Exchequer in the place of BARON LEFROY. 381

MEMORIAL.*See* AFFIDAVIT.

ASSIGNMENT.

MIS-TRIAL.*See* EVIDENCE.**MORTGAGE.***See* EJECTMENT, 4.**NAME.***See* POOR-LAWS, 6.**NEGLIGENCE.***See* COMMISSIONERS OF DRAINAGE. PLEADING.**NOTICE.***See* DISTRESS.

EJECTMENT, 2.

JUDGMENT AS IN CASE OF A NONSUIT.

PLEADING, 19.

REGISTRY OF TIMBER.

SECURITY FOR COSTS.

NOTICE TO QUIT.*See* EJECTMENT, 2.**OATH.***See* PEER.**OCCUPIER.***See* POOR-LAWS.

REGISTRY APPEAL.

PLEADING.**OFFICER.***See* CORPORATION.

DISPENSARY.

POOR-LAWS.

OYER.*See* PLEADING.

SETTING ASIDE PROCEEDINGS.

1. In granting oyer under the 89th General Order, it is not sufficient to furnish certified copies of the documents merely. If the opposite party require to compare them with the originals, he should be permitted to do so. C. P. *Longfield v. Young* 222

2. *Semble*—If the opposite party do not require to compare the copies furnished with the originals, oyer will be complete on delivery of certified copies. *Ibid*

PARTICULARS.*See* BILL OF PARTICULARS.**PARTNERS.***See* SERVICE OF PROCESS.**PEER.**

A Peer having been examined and cross-examined on a trial without being sworn, and no objection being then made to the reception of his evidence: *Held*, that it was too late to object to his testimony on motion for a new trial. Q. B. *Birch v. Somerville* 243

PLEA.*See* PLEADING.**PLEA OF CONFESSION.***See* PROCESS AND PRACTICE ACT.**PLEADING.***See* CRIMINAL LAW.

REPLEVIN.

SETTING ASIDE PROCEEDINGS.

Generally.

1. By the condition of a bond entered into between the defendant and the West of England Insurance Company,

it was declared that if the defendant should at all times faithfully execute *the duties of an agent* to the Company, and should, from time to time thereafter, within one calendar month after he should have been thereto required by notice in writing, render a faithful account of, and faithfully pay and deliver to the said Company, at their head office at E., all such sums of money, &c., as he had received or should receive, then the condition to be void.

Held, that the latter clauses controlled the former part of the condition, and that, although the defendant would, in discharge of "the duties of an agent," appointed by a simple power of attorney, be bound to pay over all balances of money in his hands, on request, yet, that under the terms of the condition of the present bond, he was not bound to do so until after having received a month's notice.
C. P. *Lewis v. Busteed* 109

2. Trover lies by a tenant for a second distress by a landlord, who has omitted to distrain all the goods available on the premises on the occasion of the first distress. E. *Clooney v. Watson* 129

3. A, in 1792, by indentures of lease and re-lease, conveyed certain premises for three lives to B, at the yearly rent of £40. This indenture contained a covenant by A, for himself, his heirs, executors, administrators and assigns, with B, that upon the death of any of the lives, he A would add and insert, to the time and term thereby granted, the life of such person as might be named, which nominated life was to be indorsed on the indenture, or written on a deed, label or parchment, to be affixed to the indenture, or in a separate deed or writing, declaring the life or lives failing, and the life and lives so to be added in lieu thereof; and also a covenant by B for himself, his heirs, executors, administrators and assigns, to pay the rent. By indenture of 1818, reciting that the interest of A in said premises was then vested in

C, and that of B in D, and that one of the lives in the original lease was dead, and that D had applied to C to execute a renewal by the insertion of a new life, to which C had agreed; it was witnessed that in pursuance of the covenant for renewal in said lease contained, C had added and inserted a new life to the term of said lease, *Habendum*, for said life, &c., *subject to the yearly rent of £40, and to all and singular the covenants and agreements in said indenture contained.* D assigned over to a third party in 1845.

Held, in an action of covenant against D, for the non-payment of rent accruing due after the assignment of 1845, that D did not thereby discharge himself of his liability under the renewal of 1818, the words, "subject to the rent and covenants," creating an express covenant, and such appearing on the face of the deed, to be the intention of the parties.—[CRAMP-
TON, J., *dissentiente*]. Ex. Ch. *Luttrell v. M-Creery* 289

4. **Held**, per MOORE, J., and BALL, J., that the parties to the deed of 1818 not being parties to the original lease, but assignees thereof, the deed of 1818 could not operate by way of enlargement, so as to create a legal estate for the additional life thereby inserted, but operated as a release of the reversion. *Ibid*

5 "It appears to me a clear and unquestionable proposition of pleading, that if malice were a necessary ingredient, it should be distinctly averred in terms in the pleading, and the want of such averment cannot be satisfied by any statement furnishing an inference of malice, however clear." Per MOORE, J. Ex. Ch. *Ward v. Freeman* 482

Declaration.

6. A Sheriff sold a term of years under a writ of *fieri facias*, and the purchaser having refused to pay the purchase-money, the Sheriff brought an action against him for the breach of contract. The first count of the de-

claration specified the conditions of sale under which the Sheriff sold, and which were that the highest bidder should be the purchaser, and that the purchase-money should be paid to A. B. (a third party), upon the purchaser being declared, and that the Sheriff would not be accountable for either possession or title. It then stated, that at the sale the defendant was the highest bidder and was declared the purchaser, and after averring mutual promises on the part of the plaintiff and defendant to perform the conditions of sale, alleged as a breach, that although the plaintiff as such Sheriff was ready and willing to execute a conveyance of the said term, yet the defendant did not pay the purchase-money. No tender of a conveyance by the plaintiff was averred.

The second count was more general, and stated that the plaintiff (without describing him as Sheriff), at the special instance and request of the defendant, bargained and agreed to sell to him a term of years, the property of J. O. H., on conditions of sale similar to those which were specified in the first count; that defendant was declared the purchaser; that although the plaintiff was ready, &c., to convey, &c., and to perform the conditions of sale—*Breach*, that defendant did not, nor would, pay the purchase-money.

Held, that it was not necessary for the plaintiff to aver the tender of a conveyance, as it was the duty of the defendant, as purchaser, to prepare and tender it to the plaintiff for execution. *E. Tennent v. Robinson* 142

7. *Held also*, that the non-payment of the purchase-money at the time of the sale did not prevent the plaintiff suing the defendant for a breach of contract in the non-completion of his purchase. *Ibid*

8. *Held also*, that the Sheriff, by disclaiming to be accountable for title or possession, did not debar himself from bringing this action. *Ibid*

9. *Held also*, that the averment in the second count disclosed a legal and binding contract, and that the Court would not intend otherwise. *Ibid*

10. A contract in writing was entered into between a Guarantee Society of the first part, and "A and B, the Vice-guardians, or the Vice-guardians for the time being, for and on behalf of the Carrick-on-Shannon Union, of the second part," whereby the former agreed, for the consideration therein mentioned, that during the employment of C as collector of poor-rate, the funds of the Society should be liable to pay to the party of the second part, "and to the persons for the time being constituting the said Vice-guardians, within three months after particulars of the loss should be furnished, all such loss not exceeding £500 as the party of the second part, and the persons for the time being constituting Vice-guardians, may sustain from any act of fraud or dishonesty committed by C." This agreement was not under seal. A and B having been removed from the office of Vice-guardians, and the former Guardians reinstated, the latter brought *assumpsit* against the Guarantee Society, default having been made by C in the payment over of poor-rates which he had collected; and the declaration, having set forth the agreement, proceeded to aver that A and B, relying on the above-mentioned guarantee, had taken C into their service, as collector of poor-rates, and that he had accepted that office, and that the clerk of the union had delivered to him "a collecting book," "a rate-receipt check book," and "rate-receipt abstracts," and that it then and there became the duty of C to collect the rates, and to pay over the receipts to the treasurer of the union. It also averred that he had received certain sums of money as such collector, and did not pay them over, but fraudulently converted them, and that the Guardians had thereby sustained loss to a certain amount:

and averred breach of their contract by the Guarantee Society.

Held, on demurrer, that the authority of the collector to receive the rates was derived from his warrant, and therefore that the declaration was bad, for the want of an averment of the issuing of a warrant to him. *E. The Guardians of The Carrick-on-Shannon Union v. The Guarantee Society* 422

11. *Semble*—The present Guardians are entitled to maintain this action under the terms of the agreement, but the defendants' liability must be limited to the time during which the Vice-guardians held office. *Ibid*

12. Where the plaintiff, an executor, had, after the decease of the testator, made a parol letting to the defendant of a house and premises, part of the testator's assets; *Held*, that the action for use and occupation was properly brought by the plaintiff in his representative capacity. *C. P. M'Auley v. Dalton* 542

13. Case, by a mill-owner against the Commissioners of Drainage in Ireland. The declaration contained five counts. The first three counts averred that the Commissioners wrongfully and injuriously deepened the bed of the plaintiff's mill-stream, removed weirs, sluices and dams, and cut channels above the mill, and thereby lessened the working water-power of the mill. The fourth and fifth counts averred that the Commissioners deepened the stream, &c., pursuant to certain Acts of Parliament, but were guilty of neglect of duty in the manner in which they prosecuted the works; also that certain specified things were not done in a proper and workmanlike manner. The plaintiff having given evidence in support of his declaration, the defendant gave in evidence the declaration of the Commissioners, under the 5 & 6 Vic., c. 89; and the *Gazette* containing the publication of the final notice, and relied on the 5 & 6 Vic., c. 89, s. 52, and 9 Vic.,

c. 4, s. 18, as ousting the right of action at Common Law. The Chief Justice (Blackburne) directed a verdict for the defendant, being of opinion that the right of action at Common Law had been taken away by the 9 Vic., c. 4, s. 18.

Held:—That the right of action at Common Law existed, notwithstanding the 5 & 6 Vic., c. 89, or 9 Vic., c. 4, where the Commissioners exceeded their jurisdiction, or acted arbitrarily, carelessly or negligently. *E. Sharpley v. Hornsby* 590

14. *Held also*, that the 9 Vic., c. 4, s. 18, refers to matters of procedure alone. *Ibid*

15. *Semble, per PRIGOT, C. B.*—That the declaration was insufficient to confer jurisdiction on the Commissioners. *Ibid*

Subsequent Pleadings.

16. By the condition of a bond entered into between the defendant and the West of England Insurance Company, it was declared that if the defendant should at all times faithfully execute *the duties of an agent* to the Company, and should, from time to time thereafter, within one calendar month after he should have been thereto required by notice in writing, render a faithful account of, and faithfully pay and deliver to the said Company, at their head office at E., all such sums of money, &c., as he had received or should receive, then the condition to be void.

Held, that the latter clauses controlled the former part of the condition, and that although the defendant would, in discharge of "the duties of an agent," appointed by a simple power of attorney, be bound to pay over all balances of money in his hands, on request, yet that under the terms of the condition of the present bond, he was not bound to do so until after having received a month's notice. *C. P. Lewis v. Butead* 109

17. To a declaration upon the above

bond, the defendant, having craved oyer of the bond and condition, which was granted, pleaded general performance; the plaintiff replied that the defendant, after the execution of the bond, received sums of money on account of the Company, amounting to £200, and that after having received them he voluntarily dispensed with the month's notice required by the condition, and rendered an account to the Company of all moneys in his hands, showing himself in debt to the Company to the amount of £800. *Held*, on demurrer, that the plaintiff having given oyer of the condition, it must be taken to be, as well as the bond, under seal, and that the defendant could not by parol dispense with the terms of the condition of the bond. *C. P. Lewis v. Busteed* 109

18. Trespass, for shooting a dog.—The defendant averred, by way of justification, that the dog was used to worry sheep, &c.; that being so used, just before he was shot by the defendant, he was worrying the defendant's sheep, and that he could not be otherwise restrained from worrying his sheep.—General demurrer. Causes assigned —That the plea did not disclose a legal justification, as it should have averred that the dog was in the act of worrying, and not that he was worrying "just before" the time when, &c. *Held*, that an averment that the dog was about to renew the attack would be a legal justification, and that the averments in the pleas amounted to that. *E. Kellett v. Stannard* 156

19. *Held also*, that the pleading, though bad perhaps for uncertainty, on special demurrer, was sufficient on general demurrer. *Ibid*

20. In an action of covenant for rent, by the lessor against the lessee, a plea that the lessor had assigned his reversion before the rent became due, *Held*, on demurrer, a good defence, without the averment of notice by the assignee to the lessee of the assignment. *E. Conran v. Pedder* 200

21. A declaration in covenant averred that

A, being possessed of certain premises as tenant at will to B, who was seised in fee thereof, in 1834, by deeds of lease and re-lease, conveyed the same to C for a term of three lives, at the rent of £42, with the usual covenant for payment thereof; that B in 1835, by deeds of lease and re-lease, conveyed the same premises to A for three different lives, and alleged that five years' rent of said premises was due by the defendant, as representative of C, to the plaintiffs, as representatives of A. The defendant pleaded that A was possessed of the premises as tenant to B for so long a time as A and B pleased, which term, after the making of the indenture of re-lease, and by reason of the death of A, wholly ceased; *absque hoc*, that A was possessed of the premises as tenant at will to B.

Secondly.—Because at the time of the making of the indenture of re-lease, A had nothing in the premises whereof she could re-lease to B.—*Held*, that these pleas were bad on general demurrer. *Q. B. Church v. Dalton* 249

22. *Held also*, that no estate passed by the deed of 1834; but *semble*, that the plaintiffs, as assignees of the grantor of that estate, could avail themselves of the estoppel thereby created. *Ibid*

23. *Held also*, that the grant of 1835 operated retrospectively, and made the estate of the lessee, which was before but an estate by estoppel, an estate in interest, and gave the lessor a reversion in the premises, which, with the benefit and burden of the covenants in the lease, was transferable to the plaintiffs. *Ibid*

24. *Held, per Moore, J.*, that as it appeared by the declaration the plaintiffs had no reversion, if the deed of 1835 had not been executed, an action of covenant would not be maintainable. *Ibid*

25. "An agreement not to sue at all is a release, and may be pleaded in bar. An agreement not to sue for a limited time cannot be pleaded in bar, but

may be the subject of a cross action." *E. Per PENNEFATHER, B. Mostyn v. Duffy* 328

26. "Suspension existing without extinguishment, as in the case of bills of exchange, is an exceptional case, founded on the exigencies of mercantile law." *Ibid*

27. Covenant.—The declaration stated that by articles of agreement, dated the 21st of December 1844, and made between the plaintiff and defendant and one G. K., which recited that G. K. was indebted to the plaintiff in £800, and that in order to secure repayment, it was agreed that the plaintiff should effect an insurance on the life of G. K. *and that G. K. should pay the premium for seven years*; the defendant covenanted with the plaintiff, his executors, administrators and assigns, to pay the premiums as they should become due. Breach—Non-payment.

Plea—That before the commencement of the action, and before the commission of the breaches assigned, the plaintiff became bankrupt, and that J. T. was appointed his assignee, and thereby became entitled to the supposed causes of action.

Replication—That by the deed of the 17th of April 1845, made between the plaintiff and M. K. his wife of the first part, T. G. and R. B. of the second part, and R. H. of the third part, the plaintiff, in consideration of £800, assigned the said policy to R. H., his executors, &c.; that the money was still due, and that the action was brought by the plaintiff for the benefit of the representative of R. H. The deed of the 17th of April 1845, being set out upon oyer, purported to assign to R. H. several policies of insurance in different amounts, the property of the plaintiff and M. K. his wife, with all sums of money due by virtue thereof, "and all advantage to be had or derived therefrom respectively," with a proviso, that on the payment of £800, R. H. should re-

assign the premises to T. G. and R. B., their executors, &c., in trust "for the plaintiff and M. K. his wife, and the survivor of them, and the executors and administrators of such survivor." *Held*, upon demurrer, that the replication was good; that the right to sue upon the covenant in the articles of the 21st of December 1844 did not pass to the assignees under the bankruptcy of the plaintiff, but might be sued for by the plaintiff for the benefit of the parties claiming under the deed of the 17th of April 1845. *C. P. Kidd v. Loughnan* 336

28. To a declaration in trespass for assault and battery and false imprisonment, the defendant pleaded justification under a Judge's *fiat*, and *capias* issued under 3 & 4 Vic. c. 105, s. 2. The plaintiff replied that the *fiat* and *capias* were obtained and issued after the passing and coming into operation of the Process and Practice Act, and that; no writ of summons had been sued out by the defendant.

Held, on special demurrer to the replication, that it was bad, because it did not negative the possibility of the action having been commenced by *capias ad respondendum* before the Process and Practice Act. *E. Batters v. Wall* 349

29. *Held also*, that the plea was sufficient on a general demurrer, although it did not show affirmatively that all the conditions necessary to found the statutory jurisdiction of the Judge to grant the *fiat* had been complied with. *Ibid*

30. *Semble*.—The Court would on motion set aside a *fiat* and *capias* obtained without a writ of summons previously sued out. *Ibid*

31. *Quære*, whether the *capias* in such a case is irregular only, or void?

The cases on the subject reviewed. *Ibid*

32. To a plea of the Statute of Limitations the plaintiff replied that the testator, after the passing of the Process and Practice Act, had, in respect to

the same causes of action as in the declaration mentioned, sued out a writ of summons against the defendant, and that within four months from the date of the writ, and whilst the suit was pending, and within six years next before its commencement, the testator died, and thereupon the suit was abated; that the plaintiff, as executrix, within a reasonable time after the death of the testator, sued out against the defendant another writ of summons, with the intent that the defendant might appear, and the plaintiff declare against the defendant; that the defendant appeared, and plaintiff declared for the same causes of action which accrued to testator within six years before the commencement of the suit. To this the defendant rejoined the non-service of the writ, or any appearance entered.—*Held*, that such rejoinder was bad, as the replication alleged matter sufficient to bring the case within the saving of the Statute of Limitations. *Q. B. Dawson v. Nash* 394

Practice in Pleading.

See BILL OF PARTICULARS.

SETTING ASIDE PROCEEDINGS.

33. Writ of summons was in trespass on the case; declaration in trespass.—*Held*, that the declaration must be set aside for variance, under the Practice and Process Act. *E. Taaffe v. Rutledge* 22

34. A special plea was filed to a declaration, and a copy of the plea furnished, which was demurred to, and notice of the lodgment of the demurrer books served on the defendant's attorney; after such service the plaintiff's attorney was served with a notice, stating the demurrer books did not correspond with the record, and pointed out several variances; thereupon plaintiff's attorney offered to withdraw the demurrer on payment of costs, and being at liberty to reply *de novo*, which offer was not accepted. *Held*, that as the copy of the pleas served was not a true copy, the plain-

tiff was entitled to the terms proposed by his notice, and also to the costs of a motion rendered necessary by the declinature of his offer. *Q. B. Sherlock v. Gibbings* 260

35. A declaration stated that A had recovered a judgment against B, on foot of which a *fi. fa.* issued to the Sheriff, under which he seized B's goods; that while the Sheriff was in possession of the goods, "in consideration that A would direct the Sheriff to relinquish the goods seized in execution, and would abandon and forego the execution," the defendant promised that she and C D would pay the debt by annual instalments, and execute a bond for the amount. It then alleged that the Sheriff, by direction of A, relinquished the goods, and averred as breach non-payment of the money. The second count was to the same effect as the first, except that the breach assigned was the non-execution of the bond. At the trial it appeared that the defendant agreed to execute the bond in question, "if the keepers which were in charge of the goods were taken off, and the goods delivered to her." *Held*, under these circumstances, that the Judge was justified in amending the declaration by stating in the averment of the consideration, "and would deliver over the goods and chattels to the said defendant," and in the averment of performance the words, "and did then and there deliver the said goods and chattels to the said defendant." *C. P. McKenna v. De Moleyns* 359

POLICY OF INSURANCE.

See PLEADING.

POOR-LAW.

See PLEADING, 10.

1. The appointment of officers by Boards of Poor-law Guardians and other acts specified in the General Orders of the Poor-law Commissioners, need not be under seal, if made and authenticated as proscribed by those General Orders; nor, if so made and authen-

ticated, need the requisitions of the 28th section of the "Poor-law Act" (1 & 2 Vic., c. 56) be complied with, where more than three Guardians are present and voting. *E. Ryan v. The Guardians of the Poor of the Kildysart Union* 1

2. The Board of Health, under 12 Vic., c. 131, s. 4, have no power to retract their approval of an appointment under that Act, where it has not been obtained by fraud or under a mistake. *Ibid*

3. "I confess I was forcibly struck by the observation, that it was not the intention of the Legislature, although for the convenience of suing and being sued, they created boards of guardians corporate bodies, to leave them to the rigid rules which regulate the contracts and acts of corporations in general; for the Act makes provision for the mode of their proceeding in such cases, and also empowers the Commissioners to prescribe rules regulating such: this would therefore show an intention on the part of the Legislature to leave them to the rules so prescribed, and not to that contingent rule which requires that the proceedings of a corporation should be attested by their seal."—*Per LEFROY, B., Ibid* 7

4. A bond, executed to A B and C D, in their individual names as paid officers duly appointed for the purpose of carrying into execution the provisions of the Poor-law Act, comes within the exception of the 96th section of that Act, 1 & 2 Vic., c. 56, and is not liable to stamp duty. *Q. B. Murratt and O'Connor v. Walsh* 70

5. Where, in a rate-book, under the Poor-law Acts, the rated person was, under the head "Occupiers," described as representatives of T. K.:—*Held*, that such description was *prima facie* good; and any objection to the rating could only be taken advantage of by appeal from the rate. *Cr. Ap. The Queen v. Higgins* 213

6. Traversers were indicted and convicted for rescuing goods and cattle distrained for poor-rates. In the rate-book and warrant, the occupier was described as "J. Westropp;" and evidence was given that J. Westropp had died previous to the issuing of the warrant, though living at the time the rate was struck.—*Held*, that such conviction was right, the occupier being sufficiently described by the initial letter of his Christian-name, and the rate being leviable, notwithstanding the death of the occupier; under 6 & 7 Vic., c. 92, the rateable hereditaments were still liable. *Cr. Ap. The Queen v. Westropp* 217

7. Premises untenanted previous to and at the time of striking of a poor-rate, though held by the owner for the purpose of letting to a tenant, are not liable to be rated for the relief of the poor. *Q. B. The Guardians of the Limerick Union v. White* 630

POWER.

See WILL.

Baron and feme, by indenture dated the 19th of June 1830, conveyed fee-simple estates vested in the wife to the use of the husband for life, remainder to the wife for life, remainder to their children in such shares and proportions as the husband and wife should appoint, and in default of appointment, share and share alike. The deed reserved a power to the husband and wife to appoint the said lands for any term of years, to any person for any sum of money not exceeding £2000, or to charge and incur the same, and the estates thereby limited, with the payment of any sum not exceeding £2000, for the use and benefit of the husband; and it was thereby also agreed that it might be lawful for the husband and wife, by any deed under their hands and seals, to make any lease or leases of all or any part of the lands for any term or number of years, or for any term of one, two, or three lives, with or without covenant for perpetual renewal.

After the execution of this deed the husband and wife, by indenture of the 23rd of June 1838, in consideration of £1000, granted a portion of these lands to the plaintiff, describing him as the mortgagor of the lands, for a term of three lives and thirty-one years in reversion after the expiration of twenty-eight years unexpired, and for such other lives as should be added in pursuance of a covenant for perpetual renewal, at the yearly rent of £277, payable at the determination of twenty-eight years. This lease contained the usual power of distress and re-entry, a covenant for payment of the rent, and a covenant for perpetual renewal on payment of one shilling as renewal fine.

Held, that as against the plaintiffs claiming under this lease of 1838, the limitations in favour of the children in the deed of 1830 were not fraudulent and void within the meaning of 10 Car. 1, sess. 2, c. 3. Q. B. *Greene v. O'Kearney* 267

Held also, that the lease of 1838 was a valid execution of the power of leasing contained in the deed of 1830. *Ibid*

PRACTICE.

See Respective Titles.

PROCESS AND PRACTICE ACT.

See AMENDMENT.

CONSENT FOR JUDGMENT.

PLEADING.

The 19th section of 13 Vic. c. 18, extends to cases in which consents for judgment have been given in actions of debt, as well as where pleas of confession have been given in actions of assumpsit. The words in the above section, "shall within the period limited by the practice of the Court file a plea of confession in such action," do not confine the operation of the section to cases in which the plea has been filed within eight days from declaration. C. P. *Watkins v. Gernon* 76

RECOVERY.

PRINCIPAL AND SURETY.

See SURETY.

PROXY.

See FEME COVERT.

RAILWAY COMPANY.

See INTERPLEADER.

1. Where a judgment is obtained against a Railway Company, and execution issued thereon, to which a return of *nulla bona* is made, the plaintiff is entitled to issue a *scire facias* against a shareholder of the Company, under the 36th section of the Companies Clauses Consolidation Act. Q. B. *Byrne v. Dublin & Bray Railway Company* 392
2. Under the 69th section of the Railway Clauses Consolidation Act, Justices have not jurisdiction to decide whether or not there shall be accommodation works; but assuming there are to be such, they are only to decide on their kind, number and sufficiency. Q. B. *The Queen v. Waterford Railway Company* 580

RATES AND RATING.

See POOR-LAWS.

REGISTRY APPEALS.

RECOGNIZANCE.

Judgment had been recovered in an action for libel against R. B., as the "publisher and printer" of a certain newspaper. The plaintiff in that action moved, pursuant to 11 G. 4, and 1 W. 4, c. 73, s. 3, to put the recognizance of M. S., one of the sureties for R. B., in suit. The affidavit on which the motion was grounded described R. B. only as "printer and publisher." *Held*, that it should have appeared by the affidavit that R. B. was "editor, proprietor or conductor" of the said newspaper. E. *Long v. Staunton* 330

RECOVERY.

See FINE AND RECOVERY.

REGISTRY APPEALS.

1. A claimant had his qualification on the list of voters for a borough, for "a house 11 George's-lane, and a house 55 Joy-street;" and it appeared he occupied in immediate succession the two houses for more than twelve months prior to the 20th of July 1852, and that he still continued to occupy the house in Joy-street, and had paid all poor-rates due out of the premises; but in the last rate for the time being, June 1852, the Joy-street house was rated in the name of another person than the claimant, at the net annual value of £12; and in the previous rate (September 1851) the rating of the George's-lane premises was also in the name of another person, at a net annual value of £14. On the 4th of August 1852, the claimant served notice on the Guardians of the Poor to rate him by name in respect of the Joy-street premises. —*Held*, that it was not necessary for the claimant, relying on a successive occupation, to have included in the claim the two sets of premises. Ex. Ch. *Agnew, appellant; Reilly, respondent* 560
2. *Held also*, that the claim made on the 4th of August was made in proper time, inasmuch as the claimant was qualified by relation on the 20th of July, all his rates being then paid. *Ibid*
3. A general appeal under the statute 13 & 14 Vic., c. 69, is not sufficient; the precise point of law appealed against must be stated. *Agnew, appellant; M'Donald, respondent* 570
4. A person admitted a free burgess of New Ross, after the Reform Act, and not deriving by birth, servitude or marriage, does not require a residence in the borough to qualify as a voter, he not being an honorary freeman within the Reform Act. *Tottenham, appellant; Meadows, respondent* 572
5. There is no such franchise in the

borough of Portarlington as a £10 freehold. Ex. Ch. *Stannus's case* 575

REGISTRY OF TIMBER.

1. A, being owner in fee, demised certain lands to B, reserving out of the demise, *inter alia*, "all timber and other trees both above and under ground;" and the indenture contained a covenant by B that he would "uphold, sustain, and keep all the houses, &c., *plantation of trees*, and other improvements whatsoever, that now are, or at any time hereafter during the said demise shall be, built or made," &c.
Held, that notwithstanding such covenant, the lessee had a property in the trees planted by him during the term, if such were registered, pursuant to the 23 & 24 G. 3, c. 39. Q. B. *Mountcashell v. O'Neill* 436
2. The 1st section of that statute enacts, that any tenant for life or lives, by settlement, dower, courtesy, jointure, lease, or office, civil, military or ecclesiastical, impeachable of waste, or any tenant for years exceeding fourteen years unexpired, who shall plant timber trees, shall be entitled to cut same. And by section 2 it is provided that the tenant so planting shall lodge an affidavit and give notice in the form following.—[It then set out a form].—*Held*, that all the persons enumerated in the 1st section were entitled to the privilege thereby granted, and that the form of affidavit thereby given might be moulded to suit the nature of the tenancy of each person so registering.—[LEFROY, C. J., *dissentiente*]. *Ibid*
3. The lessee gave notice of eight separate plantings, and in seven of these the affidavit of registry was made by the agent of the lessee, not by the lessee himself.
Held, that such affidavit, made by the tenant, steward or agent, was sufficient, the words, "in form following," in the 2nd section of the Act, being

merely directory.—[*LEFROY, C. J., dissentiente.*].—*Ex. Ch. Mountcashell v. O'Neill* 436

4. The affidavit as to one planting was sworn by the tenant himself, but the trees planted were stated to be on two denominations of land, without specifying the quantity on each; both were held under the same landlord, and the tenure of the second denomination did not appear.

Held, that such affidavit was bad, and the registry insufficient.—[*Dissentientibus, CRAMPTON, J., and PERKIN, J.*] *Ibid*

5. In another affidavit, two denominations of land were also comprised, but they were held under different landlords, and the number of trees planted on each was lumped, and the quantity planted on each was not specified.

Held, such an affidavit was bad, and the registry insufficient. *Ibid*

RELEASE.

*See COVENANT.
PLEADING, 4.*

RENEWABLE LEASEHOLD CONVERSION ACT.

See REPLEVIN.

RENEWAL.

See PLEADING.

RENT.

See SHERIFF, 3.

REPLEVIN.

See DISTRESS.

1. The statute 14 & 15 *Vic.*, c. 20 (extending the remedies provided by the Renewable Leasehold Conversion Act for the recovery of fee-farm rents under that Act to all other fee-farm rents, and to other rents in Ireland, reserved upon grants of land, in which the grantor has no reversion), applies to a replevin proceeding at the time of the statute. *C. P. Major v. Barton* 28
2. Proceedings in replevin stayed after

avowries filed, upon payment of the costs of the action and distress, and costs of the application, and delivering up the bail bond to be cancelled, there being no special damage averred in the declaration. *Q. B. Maunsell v. Purcell* 229

3. The goods of several undertenants were seized by the head landlord under distress for rent due by the middleman, but were afterwards restored to their owners on a replevin issued by him.

The undertenants having subsequently sued out writs of replevin and summonses in replevin, pursuant to the 13 *Vic.*, c. 18, in respect of the same seizure, the Court directed the proceedings to be set aside. *C. P. Barry v. Purcell* 373

4. The writ of replevin does not apply where the goods seized are in the plaintiff's possession at the time of the issuing of the writ. *Ibid*

5. In proceedings in replevin under 13 *Vic.*, c. 18, the plaintiff is bound both to serve the writ of summons in replevin, and also to sue out the writ of replevin. *Ibid*

RESIDENCE.

See CIVIL-BILL.

REVERSION.

*See ESTOPPEL.
PLEADING, 4.*

RIGHT OF ENTRY.

See EJECTMENT.

SCIRE FACIAS.

*See SERVICE OF PROCESS, 3.
SETTING ASIDE PROCEEDINGS.
VENUE 5.*

1. Where an order by the Court of Chancery under the 13, 14 *Vic.* c. 60, s. 35, vesting a judgment in new trustees, this Court will permit the new trustees to issue a *scire facias* upon such judgment. *E. Hartley v. Blennerhasset* 138
2. In a case in which a writ of *scire facias* was directed, under the 171st General Order, to the Sheriff of Long-

ford, where defendant resided, the officer refused to issue the jury process, &c., to the Sheriff of Dublin, on the ground that the direction of the writ determined the venue of the action or place of trial. The Court ordered that the plaintiff be at liberty to file a suggestion that it was more convenient to have the case tried in Dublin, and that the officer should therefore issue the jury process, &c. *E. Gilhuly v. O'Neill* 159

3. *Semble*, that the New Rules only refer to the service of the writ, and do not affect the old practice as to the venue. *Ibid*

4. Where a judgment was obtained by warrant of attorney on a bond conditioned for the payment of advances to a Banking Company, and a *scire facias* was issued thereon, suggesting in the body of the *scire facias* breaches of the condition, and judgment was obtained on this *scire facias* for want of plea, the Court refused to set it aside as irregular. *Q. B. Montgomery v. Byrne* 235

5. *Semble*—Such objection would be good on demurrer, the statute 9 *W.* 3, c. 10, only authorising the embodying in the writ the suggestion of breaches where a previous suggestion had been filed on the roll of the judgment. *Ibid*

6. Where a judgment is obtained against a Railway Company, and execution issued thereon, to which a return of *nulla bona* is made, the plaintiff is entitled to issue a *scire facias* against a shareholder of the Company, under the 36th section of the Companies Clauses Consolidation Act. *Q. B. Byrne v. Dublin and Bray Railway Company* 392

SECURITY FOR COSTS.

1. The Court will not compel an insolvent to give security for costs in an action by him against his assignees, where it appears to be brought *bona fide* for the purpose of trying a substantial question of property. *C. P. Delahay v. Kelly* 34

2. A sea-faring man, occasionally resident in this country, will not be required to give security for costs in an action brought by him. *Q. B. Conway v. Wilson* 47

3. Notice of motion for plaintiff to give security for costs is late after the time for pleading has expired, and a certificate of no plea ordered in the office. *E. Leckham v. Gresham* 139

4. Where the plaintiff's attorney, in reply to a notice requiring security for costs, undertook to meet the defendant's attorney at the office of the Master of the Court, for the purpose of measuring the security, and afterwards attended pursuant to such undertaking, but the defendant's attorney did not attend, in consequence of which the amount of the security was not measured; the declaration having been filed, and the rule for judgment entered, the Court, under the above circumstances, refused an order to compel the plaintiff to give security for costs. *C. P. Bateman v. Sneyd* 376

SERVICE OF PROCESS.

See SCIRE FACIAS.

1. On an application to substitute service under the 9th section of 13 *Vic.* c. 18, on the ground that the defendant is resident out of the jurisdiction, it is not necessary that the affidavit in support of the motion should state that the defendant has not been personally served with the writ of summons, and has not appeared according to the exigency thereof. *C. P. Nolan v. Fitzgerald* 79

2. An order that service upon Messrs. A and B (partners) shall be deemed good service upon the defendant, is not complied with by serving one of those partners at a place which is not their place of business. *Ibid*

3. A *scire facias* having issued to revive a judgment against the heir and terretenants of A, the Sheriff served B the heir with a notice requiring him to appear on the return of the writ,

and show cause according to its tenor, but neglected to serve any copy of the *scire facias* pursuant to the 171st General Order. *Held*, under these circumstances, that the Court would not on motion set aside the Sheriff's return of *scire feci*, more particularly as in case a new writ should issue, the judgment would be barred by the Statute of Limitations. C. P. *Markey v. Dowdall* 117

SETTING ASIDE PROCEEDINGS.

See SERVICE OF PROCESS.

SUGGESTION OF BREACHES.

VERDICT.

WARRANT OF ATTORNEY.

1. Writ of summons was in trespass on the case; declaration in trespass. *Held*, that the declaration must be set aside for variance, under the Practice and Process Act. E. *Taaffe v. Rutledge* 22
2. *Held also*, that the writ could not be amended under the 3rd section of that Act, even though the Statute of Limitations might be pleaded to a new action. *Ibid*
3. A defendant cravedoyer of letters testamentary, and omitted to set out the will, only stating the certificate of the ordinary. *Held*, that such proceedings were irregular, and would be set aside on motion. Q. B. *Exors. Collins v. O'Mullane* 65
4. An arrest under a *ca. sa.*, marked for £18. 1s. 5d. the amount of the judgment, where there was less than £10 actually *due* at the time the *ca. sa.* issued, is illegal, and the defendant will be discharged. E. *Lessee Shuldham v. Boles* 140
5. The writ is void, and will be set aside (no fact being in dispute) without further application, although that formed no part of the conditional order, which was simply for the discharge of the defendant from custody. *Ibid*
6. The goods of several undertenants were seized by the head landlord

under distress for rent due by the middleman, but were afterwards restored to their owners on a replevin issued by him.

The undertenants having subsequently sued out writs of replevin and summonses in replevin, pursuant to the 13 Vic. c. 18, in respect of the same seizure, the Court directed the proceedings to be set aside. C. P. *Barry v. Purcell* 373.

SHAREHOLDER.

See RAILWAY COMPANY.

SCIRE FACIAS.

SHERIFF.

See ARREST.

PLEADING.

SERVICE OF PROCESS.

1. Goods were seized under a *fi. fa.* by the Sheriff, in the house of A. B and C having claimed the goods, the Sheriff applied under the Interpleader Act, 9 & 10 Vic., c. 64, when it was ordered by the Court that an issue should be tried between B and the execution creditor; and the latter declining to take any issue with C, the goods claimed by him were directed to be restored. The issue between B and the execution creditor terminated in a compromise, pursuant to which the goods were sold. B having applied that the Sheriff might pay over to him the money in his hands, a reference was granted (C appearing on the motion) to ascertain the expense incurred by the Sheriff in keeping the goods, and also certain cattle, the property of C.—*Held*, that under these circumstances the Court could not stay an action of trespass brought by C against the Sheriff, but might confine the cause of action to acts of unnecessary violence not incidental to the original seizure. C. P. *Deering and O'Hara, Executors of Gildea, v. Mahon* 25
2. A defendant, arrested under a writ of *ca. sa.*, is not liable to be detained in custody until the Sheriff's poundage

be paid, after tendering the amount and costs of the judgment.—[*Cowper v. Goold* (2 Jo.) dissented from.]—Q. B. *Chadwick v. Atkinson* 37

3. A Sheriff, under a writ of *fiery facias*, having seized growing crops, the plaintiff in the execution declined to pay the landlord a year's rent claimed out of the premises, and thereupon the Sheriff abandoned the seizure and returned *nulla bona*.—*Held*, that growing crops are "goods and chattels" within the meaning of the 9 *Anne*, c. 8, and that the Sheriff was justified in not selling unless the execution creditor satisfied the landlord for the rent. Q. B. *Allen v. Lloyd* 53

4. In an action on the case, against a Sheriff for a false return of *non est inventus*, the measure of damages is the actual value of the custody to the plaintiff, and it lies on the plaintiff to give some evidence from which the jury may calculate that value, independently of the amount in the writ. E. *Cahill v. Verner* 549

5. Where the jury have found their verdict on a wrong principle, the Court will set it aside and direct a new trial. *Ibid*

6. The indorsement on the writ described the defendant in the execution as "residing with his mother near the town of Carrickmacross, in the county of Monaghan."—*Held*, a sufficient description, inasmuch as the Sheriff made no objection to it on receiving the writ, and showed by his return that he was in no doubt as to the person. *Ibid*

STAMP DUTY.

1. A bond, executed to A B and C D in their individual names, as paid officers duly appointed for the purpose of carrying into execution the provisions of the Poor-law Act, comes within the exception of the 96th section of that Act, 1 & 2 *Vic.*, c. 56, and is not liable to stamp duty. Q. B. *Marratt and O'Connor v. Walsh* 70

2. *Semle*—On a writ of inquiry in pursuance of a suggestion of breaches,

the bond on which the judgment is entered may be objected to for want of a stamp. *Ibid*

3. An annuity was granted to M. F. for his life, payable out of the consolidated fund. He, by deed, assigned said annuity for value to D. J., to hold to D. J., his heirs, executors, administrators and assigns, for the life of M. F. On the death of D. J., intestate, in 1813, the said annuity was treated as personalty, and divided in equal shares amongst the next-of-kin.—*Held*, that the legacy duty did not attach upon this annuity under the provisions of the Stamp Act, 54 *G.* 3, c. 92. E. *Regina v. Norreys* 414

STATUTES.

PARTICULAR STATUTES CITED AND COMMENTED ON.

10 *Car.* 1, sess. 2, c. 3. Fraudulent Conveyance 267

9 *W.* 3, c. 10. Suggestion of Breaches 230

The provisions of this statute are mandatory, and cannot be waived by agreement between the parties. Q. B. *Montgomery v. Byrne* 230

This statute only authorises the embodying in the writ the suggestion of breaches, when a previous suggestion has been filed on the roll of the judgment. *Ibid* 235

4 & 5 *Anne*, c. 16. Attornment 201

6 *Anne*, c. 7. Sheriff's Fees 38

9 *Anne*, c. 8. Sheriff—Landlord and Tenant 58

11 *Anne*, c. 2. Landlord and Tenant 588

11 *Anne*, c. 11. Ejectment 125

4 *G.* 1, c. 5. Ejectment 120

8 *G.* 1, c. 2. Ejectment 120

5 *G.* 2, c. 4. Landlord and Tenant 588

25 *G.* 2, c. 13. Landlord and Tenant 369

5 & 6 *G.* 3, c. 20. Charitable Institutions 386

23 & 24 *G.* 3, c. 39. Registry of Timber 436

28 *G.* 3, c. 31. Judgment of Nonsuit 197

54 *G.* 3, c. 92. Stamp Act 414

56 G. 3, c. 88. Growing Crops	54
9 G. 4, c. 14. Limitation	94
11 G. 4 & 1 W. 4, c. 73. Recognizance	330
4 & 5 W. 4, c. 22. Apportionment	372
4 & 5 W. 4, c. 92. Fines and Recoveries	163
1 & 2 Vic., c. 56. Poor-law	1, 70
1 & 2 Vic., c. 110. Principal and Surety	579
3 & 4 Vic., c. 105. Pigot's Act	103, 349, 364
5 & 6 Vic., c. 89. Drainage Acts	590
6 & 7 Vic., c. 92. Poor-laws	217
7 & 8 Vic., c. 106. Malicious Injury	405
8 Vic., c. 16. Companies Clauses Consolidation Act	392
8 & 9 Vic., c. 20. Railways	580
9 Vic., c. 4. Drainage Act	590
9 & 10 Vic., c. 64. Interpleader	25, 84, 129
9 & 10 Vic., c. 93. Lord Campbell's Act	219
The object of the 3rd section of this statute was to prohibit different actions being brought in respect of the same casualty to the same person; not to prohibit the representatives of each person from maintaining a separate action. C. P. <i>Henderson v. Leycester</i>	
9 & 10 Vic., c. 111. Growing Crops—Notice of Distress	54, 129
10 & 11 Vic., c. 79. Drainage	597
11 & 12 Vic., c. 28. Arrest	140
12 Vic., c. 131. Board of Health	1
12 & 13 Vic., c. 77. Incumbered Estates	32
12 & 13 Vic., c. 105. Distress	29
13 Vic., c. 18. Process and Practice,	22, 76, 375, 394
13 & 14 Vic., c. 60. Trustee Act	139
13 & 14 Vic., c. 69. Registry Act	561
13 & 14 Vic., c. 89. Chancery Regulation Act	226
14 & 15 Vic., c. 19. Criminal Law	211
14 & 15 Vic., c. 20. Fee-farm Grants—Landlord's Rent	29, 56
14 & 15 Vic., c. 25. Emblements	56, 406
14 & 15 Vic., c. 57. Civil Bill	380

STAYING PROCEEDINGS.

See CONSOLIDATION OF ACTIONS.
SHERIFF.

1. Where an action is brought against an administrator, and pending that action a cause petition is filed to administer the assets of the deceased, the Court, under the provisions of the Chancery Regulation Act, stayed the proceedings; but in such case the costs of the proceedings at law will not be allowed. Q. B. *Moriarty v. Moriarty* 226
2. Proceedings in replevin stayed after avowries filed, upon payment of costs of the action and distress, and costs of the application, and delivering up the bail bond to be cancelled, there being no special damage averred in the declaration. Q. B. *Maunsell v. Purcell* 229

STOPPAGE IN TRANSITU.

See TROVER.

SUBMISSION.

See AWARD.

SUBSTITUTION OF SERVICE.

See SERVICE OF PROCESS.

SUGGESTION.

See SCIRE FACIAS.
VENUE.

SUGGESTION OF BREACHES.

See EVIDENCE.

STAMP DUTY.

In the condition of a bond, reciting that the defendant kept an account with and discounted bills of exchange and other securities with a Banking Company, was contained an agreement that if W. B. (the defendant) and A. G., or either of them, their heirs, &c., should satisfy and pay such sums of money as they might be indebted in to the Banking Company for advances, then the bond was to have no effect; and there was also a proviso, that it might be lawful for the Banking Company to enter judgment on the bond by virtue of a warrant of attorney, and sue out execution on said

judgment for the amount of such sums as should appear by the books of the Company to be due and owing by the obligors or either of them, without filing any suggestion of breaches upon the bond. The defendant was arrested on a *ca. sa.*, issued on foot of a judgment so entered, without any suggestion of breaches being filed.

Held, that the execution was irregular, such case coming within the provisions of the statute 9 W. 3, c. 10, and requiring a suggestion of breaches. Q. B. *Montgomery v. Byrne* 230

2. *Held also*, that the provisions of the statute are mandatory, and cannot be waived by agreement between the parties. *Ibid*

Delacour v. Murphy (13 Ir. Law Rep. 195) followed.

3. Where a judgment was obtained by warrant of attorney on a bond conditioned for the payment of advances to a Banking Company, and a *scire facias* was issued thereon, suggesting in the body of the *scire facias* breaches of the condition, and judgment was obtained on this *scire facias* for want of plea, the Court refused to set it aside as irregular. *Ibid*

4. *Semble*.—Such objection would be good on demurrer, the statute 9 W. 3, c. 10, only authorising the embodying in the writ the suggestion of breaches where a previous suggestion had been filed on the roll of the judgment. *Ibid.* 235

5. A and B entered into a joint and several bond, with warrant of attorney to confess judgment thereon. The bond was a simple money bond, but the warrant of attorney referred to the provisions of an annuity deed executed contemporaneous therewith. By this deed, A granted an annuity to the plaintiff, chargeable on certain lands in the deed named; and it was thereby agreed that if any gale of this annuity should be in arrear, it should bear interest, and that a receiver

should be appointed; and in case he should be interfered with in receipt of the rents, or in case same should be insufficient, that plaintiff might proceed under the powers conferred by the deed or the judgment collateral therewith. Three gales of the annuity being in arrear, plaintiff issued execution without a previous assignment of breaches. *Held*, that such execution was irregular, and ought to be set aside. Q. B. *Ryan v. Massy* 642

SUMMONS.

See WRIT OF SUMMONS.

SURETY.

See BANKRUPT.

RECOGNIZANCE.

SURRENDER.

See EJECTMENT.

SURVIVOR.

See ANNUITY.

SUSPENSION OF ACTION.

Assumpsit on a promissory note. Plea—general issue. The defence at the trial was—first, that certain costs due to the defendant were by deed assigned by him to the plaintiff as a security for the debt, and thereby on the face of the deed, although there were no express words to that effect, the right of action was suspended by operation of law until the security given by the deed had failed. Secondly, that prior to the execution of the deed, and on the faith of which it was executed, a parol agreement was entered into that all proceedings on foot of the promissory note should be suspended until the security given by the deed had failed.

Held—First, that the right of action was not suspended by operation of law.

Secondly—That, assuming the parol agreement to be admissible in evidence, it would not suspend the right of action. E. *Mostyn v. Duffy* 319

“A right of action once suspended

is for ever extinguished." *Per* LE-FROY, B. E. *Mostyn v. Duffy* 329

"Suspension existing without extinguishment, as in the case of bills of exchange, is an exceptional case, founded on the exigencies of mercantile transactions." *Per* PENNEFATHER, B. *Ibid.* 328

TENANT AT WILL.

See ESTOPPEL.
PLEADING.

TENDER.

See PLEADING, 6.

TIMBER.

See AFFIDAVIT.
REGISTRY OF TIMBER.

TRESPASS.

See PLEADING.
SETTING ASIDE PROCEEDINGS.
SHERIFF.

TROVER.

See PLEADING, 2.

1. A, a Scotch distiller, had consigned ten puncheons of whiskey to B, an Irish spirit dealer, residing in Newry. With the consignment, A sent to B an invoice of the whiskey, and a *delivery order*, directed to the collector of excise at Newry.—The latter document ran thus:—
"SIR—Receive the duty, and deliver to the order of B the undermentioned ten casks of British plain spirits, warehoused at Newry on the 20th of April 1850, by A and Co., &c. (Signed) A and Co." B lodged the delivery order with the storekeeper of the excise, and removed six of the ten casks, having paid the duty on them, but no transfer of the whiskey was made to the name of B in the excise books. B afterwards became bankrupt, and A transferred the four puncheons which remained in the excise stores to C, who paid the duty on them and removed them. Trover having been brought by the assignees

of the bankrupt for these four casks; *Held*, that the possession was transferred from the vendor to the vendee by the lodgment of the delivery order, without any transfer in the books of the excise, and that the right of stoppage *in transitu* by the unpaid vendor was therefore gone. E. *Orr v. Murdock* 9

2. *Held also*, that the payment of the duty by the vendee was not a condition precedent under the delivery order. *Ibid*

TRUSTEE.

See EJECTMENT, 1.
SCIRE FACIAS.

Where an order by the Court of Chancery under the 13 & 14 Vic., c. 60, s. 35, vesting a judgment in new trustees, this Court will permit the new trustees to issue a *scire facias* upon such judgment. E. *Hartley v. Blennerhassett* 138

UMPIRE.

See ARBITRATION.

USE AND OCCUPATION.

See PLEADING, 12.
VENUE, 6.

VARIANCE.

See PLEADING, 33.
SETTING ASIDE PROCEEDINGS.

VENUE.

1. Venue may be changed, in debt for use and occupation. *Gore v. Gore* (Smythe's R. 244) overruled. E. *Earl of Orkney v. Dwyer* 23
2. In a case in which a writ of *scire facias* was directed, under the 171st General Order, to the Sheriff of Longford, where defendant resided, the officer refused to issue the jury process, &c., to the Sheriff of Dublin, on the ground that the direction of the writ determined the venue of the action or place of trial. The Court ordered that the plaintiff be at liberty to file a suggestion that it was more convenient to have the case tried in

VENUE.

Dublin, and that the officer should therefore issue the jury process, &c.

3. *Seemle*, that the New Rules only refer to the service of the writ, and do not affect the old practice as to the venue. *E. Gilhuly v. O'Neill* 159
4. In *scire facias* the Court will not allow a suggestion to be entered on the record, for the purpose of changing the venue, unless upon an affidavit, showing that the trial can be more conveniently had in some other place. *C. P. Hearne v. Haydon* 225
5. This Court will not allow a suggestion to be entered on the record to change the venue in an action of *scire facias*; the venue in such action should be where the original judgment was entered, viz., county of the city of Dublin. *Brew v. O'Brien* (2 Ir. Com. Law Rep. 159) disapproved of. *Q. B. Kearse v. Drew* 646
6. In an action of debt for use and occupation, the venue may be changed upon the common affidavit. *C. P. College of Physicians v. Power* 648

VERDICT.

A plaintiff, not being prepared to go to trial pursuant to his peremptory undertaking, in consequence of the absence of a material witness, applied to the Judge at Nisi Prius for, and obtained, a postponement until the Sittings of the Consolidated Nisi Prius Court in the next Term. The plaintiff did not proceed to trial until the Sittings after the next Term, when the defendant objected to the case being proceeded with, as he was entitled to judgment absolute as in case of nonsuit. The Judge having allowed the case to go on, the defendant disappeared, and there was a verdict for the plaintiff. On motion to set aside the verdict, and for judgment as on a nonsuit; *Held*, the verdict should be set aside, and that plaintiff, in not going to trial in Term, or having applied to enlarge the time, was guilty of neglect within the statute 28 G. 3, c. 31, s. 2. No

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rule on the other part of the motion. *E. Garvey v. Scott* 197

VOTE.

See REGISTRY APPEAL.
VOTE BY PROXY.

VOTE BY PROXY.

See CORPORATION.
DISPENSARY.
FEME COVERT.
HOSPITAL.

WAIVER.

See AFFIDAVIT, 2.
DISTRESS.
EJECTMENT.

WARRANT.

See PLEADING, 9.

WARRANT OF ATTORNEY.

See SUGGESTION OF BREACHES.

A bond and warrant were executed contemporaneously with a marriage settlement, to which both the obligor and the plaintiffs were parties. It was provided by the settlement that the trustees should raise the amount on the bankruptcy, &c., of the obligor; and in case it should not be raised, that the bond and warrant should be delivered up to be cancelled; or if judgment entered thereon that the same should be satisfied. Judgment had been entered and execution issued, and a month after the obligor became a bankrupt. Upon motion to set aside execution, &c., on behalf of the assignees of bankrupt, on the ground that the defeasance contained in the settlement had not been written on the warrant of attorney, pursuant to the 3 & 4 Vic., c. 105, s. 14; *Held*, that the marriage settlement was not a defeasance within the meaning of the Act. *E. Walsh v. Dower* 102

WILL.

1. R. M., being seised to him, his heirs, &c., of the lands of L. for a term of three lives, with covenant for renewal, devised to R. C. and his heirs all his

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property, real and personal, except as hereinafter excepted, and subject to all his debts and legacies. He also bequeathed an annuity to his wife and a legacy to be paid by R. C., and a further legacy of £500, to be disposed of by her will to her granddaughters, in such proportions as she should direct. Testator then bequeathed to A. E. his house and lands of L., in trust for his son R. E., together with the appurtenances, he not to commit waste, the said A. E. to remain and occupy the premises during his life, and then his son to succeed him; and in case R. E. should die before his father, then A. E.'s second son, if surviving his father, was to be in his place and stead.

Held, that R. E. took an estate *quasi* fee in the house and lands of L. Q. B. *In re English* 284

2. Testator devised certain estates upon trust to permit his father during his life to receive the rents thereof; and from and after his decease, to the use of testator's brother R. A. R., his heirs, executors, administrators and assigns for ever. The will then contained this proviso:—"Notwithstanding the devise hereby before made for said R. A. R., I hereby direct, order and devise that the said R. A. R. shall have but a *life estate* in all said estates and property, and that in the event of his having one or more child or children, lawfully begotten, then said estates shall go and *descend* to such issue according to the usual course of family settlements, to the first and every other son, and in default of male issue to the issue female; and if no such issue, then to such uses, &c., as my said father shall appoint by deed or will." *Held*, that R. A. R. took an

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estate for life, with remainder to his first and other sons in tail male, and ulterior limitations over. Q. B. *In re Rogers* 625

3. A testator devised lands to his son as tenant for life, with remainders in strict settlement; and in the will was contained a large leasing power, together with a power to charge and incumber the lands and premises with a maintenance or jointure for any wife the devisee might marry, to such amount as he may deem expedient, "in proportion to the portion he may receive with such wife." The will also contained a power to charge the lands with £4000 for younger children, in such shares as the donee might think fit. The son married a lady who brought him no fortune, and he, by his will, charged the lands with £200 as a jointure for his wife. *Held*—that the power was well exercised. Q. B. *In re Molton* 534

WITNESS.

Practice in applying to examine witnesses resident abroad. Q. B. *Boyce v. Rusboro'* 266

WRIT.

See SETTING ASIDE PROCEEDINGS. SHERIFF.

WRIT OF INQUIRY.

See EVIDENCE.

SUGGESTION OF BREACHES.

WRIT OF SUMMONS.

The Court will not allow a writ of summons to be amended by adding the residence of the plaintiff. Q. B. *Curry v. Johnson* 641



